Petition

81-1517

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ALEXANDER L. STEVAS,
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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

JOHN R. HILDEBRAND,
Petitioner,

-VS-

BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, CLIFTON R. WHARTON, President, Michigan State University; JOHN EDWARD CANTLON, Provost, Michigan State University; EDWARD A. CARLIN, Dean of University College, Michigan State University; DOUGLAS DUNHAM, CLINTON A. SNYDER, CECIL M. MACKEY, CLARENCE L. WINDER, WILLARD G. WARRINGTON, and DONALD R. COME,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE COURT IN DECIDING A MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT MADE BY THE PARTY HAVING THE BURDEN OF PROOF, SHOULD APPLY A STANDARD WHICH TAKES INTO CONSIDERATION THAT BURDEN.

II. WHETHER IT IS PROPER FOR THE COURT TO SET ASIDE A JURY VERDICT AND CONCLUDE THAT A FACULTY MEMBER AT A PUBLIC UNIVERSITY WOULD HAVE BEEN TERMINATED REGARDLESS OF FIRST AMENDMENT PROTECTED ACTIVITIES, WHEN THE COURT RELIES UPON DEPARTMENTAL REVIEW PROCEDURES WHICH DEVIATED FROM THE NORMAL PATTERN, BOTH PROCEDURALLY AND SUBSTANTIVELY, IN A CASE WHERE FAVORABLE RECOMMENDATIONS WOULD HAVE BEEN RECEIVED IF THE NORMAL REVIEW PROCEDURES HAD BEEN FOLLOWED.

III. WHETHER IN A CASE WHERE AN UNTENURED FACULTY MEMBER AT A PUBLIC UNIVERSITY IS TERMINATED FOLLOWING HIS CRITICISM OF CERTAIN INSTRUCTIONAL POLICIES AND HIS ELECTION TO THE DEPARTMENTAL ADVISORY COMMITTEE THE JURY COULD FIND THAT THE FACULTY MEMBER WOULD NOT HAVE BEEN TERMINATED IN THE ABSENCE OF CONDUCT PROTECTED BY THE FIRST AMENDMENT WHEN:

1. The denial of tenure was the only time that tenure had been denied to a member of the department in his position.

2. There was testimony that his performance was among the top members of the department.

3. One of the reasons for termination set forth by Defendants in the recommendation form for tenure was that Plaintiff had been "openly irritated" about certain job requirements.

4. There was testimony that one of the Defendants stated that the termination was because of the outcome of the departmental election and the Court of Appeals recognized that members of the group which recommended that tenure be denied had reacted with "consternation" to the outcome of the departmental election.

5. The Defendants deviated from the normal review procedure and, had they followed the normal procedure, they would have received favorable recommendations.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

THE FIRST TRIAL 3

THE SECOND TRIAL 4

THE COURT OF APPEALS STATEMENT OF FACTS 5

FACTS NOT NOTED BY THE COURT OF APPEALS 9

THE DECISION OF THE COURT OF APPEALS 14

REASONS FOR GRANTING A WRIT 16

I. *THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER STANDARD OF REVIEW IN A CASE WHERE THE PARTY SEEKING A DIRECTED VERDICT OR J.N.O.V. HAS THE BURDEN OF PROOF* 16

II. *THE DECISION BELOW IS IN DIRECT CONFLICT WITH DECISIONS OF THE SUPREME COURT REGARDING THE APPROPRIATE EVIDENTIARY GUIDELINES* 21

III. *THE DECISION BELOW CONSTITUTES A DENIAL OF THE RIGHT TO JURY TRIAL BY A COMMON BUT UNWARRANTED JUDICIAL RELUCTANCE TO ENFORCE THE FIRST AMENDMENT WITHIN PUBLIC COLLEGES AND UNIVERSITIES* 22

A. *THE LOWER COURTS FAILED TO UNDERSTAND THE IMPORTANCE OF THE FIRST AMENDMENT IN THE UNIVERSITY SETTING* 22

TABLE OF CONTENTS—(Cont'd)

Page

B. *THE EVIDENCE IN SUPPORT OF THE JURY VERDICT IS OVERWHELMING* 24

C. *THE IMPACT OF THIS CASE ON THOSE WISHING TO EXERCISE FIRST AMENDMENT RIGHTS IS DEVASTATING* 26

D. *THE ISSUES ARE CLEARLY PRESENTED AND CAN BE EASILY REVIEWED BY THIS COURT* 27

CONCLUSION 28

APPENDIX (Separately Printed)

Opinion of the United States Court of Appeals for the Sixth Circuit, Docket No. 80-1618, decided and filed October 19, 1981 ..... 1a

Opinion of the United States District Court for the Western District of Michigan, Docket No. G 285-71 CA 5, filed September 9, 1980 ..... 11a

Judgment on decision by the Court of the United States District Court for the Western District of Michigan, file no. G 285-71, filed September 11, 1980 ..... 45a

Order Denying Petition for Rehearing by the United States Court of Appeals for the Sixth Circuit, filed December 1, 1981 ..... 46a

Opinion of the United States Court of Appeals for the Sixth Circuit, Docket No. 77-1435, decided and filed August 16, 1979 ..... 47a

Opinion of the United States District Court for the Western District of Michigan, file no. G 285-71 CA 5, filed March 18, 1977 ..... 64a

Jury Verdict in the United States District Court for the Western District of Michigan, file no. G 285-71 CA, dated January 5, 1980 ..... 115a

TABLE OF CONTENTS—(Cont'd)

Page

Plaintiff's Exhibit 14, Policy Handbook, portions of pages 8 and 9 ..... 121a

Plaintiff's Exhibit 28, letter from the council of the A.A.U.P. to Professor Douglas Dunham dated February 19, 1969 ..... 122a

Plaintiff's Exhibit 66, Recommendation Form for Tenure Action, dated September 11, 1968 ..... 127a

TABLE OF AUTHORITIES

Cases: Page

Arlington Heights v *Metropolitan Housing Corp*, 429 US 252 (1977) 21, 22, 26

Federal Insurance Company v *Summers*, 403 F2d 971 (1st Cir, 1968) 16

Givhan v *Western Line Consolidated School District*, 439 US 410 (1979) 23, 25

Hildebrand v *Board of Trustees of Michigan State University*, 607 F2d 705 (6th Cir, 1979) 3

Jones v *Hopper*, 410 F2d 1323 (10th Cir, 1969) 23

Mihalchak v *American Dredging Company*, 266 F2d 875 (3rd Cir, 1959) 20

Mt. Healthy City Board of Ed v *Doyle*, 429 US 274 (1977) 16, 22

Sweezy v *New Hampshire*, 354 US 234 (1957) 22

Wood v *Strickland*, 420 US 308 (1975) 19

Miscellaneous:

5A Moore's Federal Practice ¶50.02 (2nd ed) 16

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, John R. Hildebrand, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on October 19, 1981.

OPINIONS BELOW

The Opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The Opinion of the District Court, which was not reported, appears in the Appendix hereto. This case was twice tried to a jury in the District Court and was twice appealed to the Court of Appeals for the Sixth Circuit. The Opinion of the Court of Appeals in the first trial is reported at 607 F2d 705 (1979), and a copy of that Opinion appears in the Appendix hereto. The Opinion of the District Court on the first trial, which was not reported, appears in the Appendix hereto.

JURISDICTION

The Judgment of the Court of Appeals for the Sixth Circuit was entered on October 19, 1981. A timely Petition for Rehearing and Rehearing En Banc was denied on December 1, 1981, and this Petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 USC 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble,

and to petition the Government for a redress of grievances." U.S. Const, Am I.

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const, Am VII.

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const, Am XIV.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 USC §1983.

STATEMENT OF THE CASE

The Plaintiff, Hildebrand, was an untenured faculty member at Michigan State University. His employment with Michigan State University was terminated on August 31, 1969. This suit was filed on October 12, 1971 against the Board of Trustees of Michigan State University and Clifton R. Wharton, its President, John Edward Cantlon, its Pro-

vost, Edward A. Carlin, the Dean of University College, Douglas Dunham, the head of the Department of Social Science, and Clinton A. Snyder, Dunham's assistant. Plaintiff alleged that his termination was in retaliation for the exercise of his First Amendment rights and that the University procedures which were followed violated the due process clause of the Fourteenth Amendment. Jurisdiction was alleged under the First and Fourteenth Amendments, 42 USC §§1983 and 1985, 26 USC §§1331 and 1343. This case has been tried to a jury on two different occasions.

THE FIRST TRIAL

Pursuant to demands for jury trial by all parties, the case was tried to a jury for approximately five days, ending on October 15, 1974. After both sides had rested but before the jury was instructed, Judge Wendell A. Miles for the first time questioned whether a jury was appropriate and ruled on his own motion that it was a case in equity and that the matter would not be submitted for a jury verdict. Instead, Judge Miles submitted certain interrogatories to the jury as an advisory jury. The answers to the interrogatories to the jury indicated that Hildebrand should be reinstated to employment at Michigan State University. The jury also found that Hildebrand should have been reappointed. (58a) The jury was not asked to fully respond regarding all of Plaintiff's claims, but did indicate that the department had complied with some of the procedural requirements which were in effect. The Court of Appeals noted that:

> "Presumably the basis for the jury's conclusion was that the plaintiff's firing was done in retaliation for the exercise of his First Amendment rights." (1st Court of Appeals Opinion, p 13.) (59a)

On March 18, 1977, Judge Miles filed an Opinion in favor of Defendants, dismissing the case. Plaintiff appealed this decision to the Court of Appeals. By decision dated August 16, 1979 in docket no. 77-1435 *Hildebrand* v *Board of Trustees of Michigan State University*, 607 F2d 705 (6th

Cir. 1979), the Court of Appeals reversed and remanded for jury trial on all issues.

THE SECOND TRIAL

Following remand, Cecil M. Mackey, Clarence L. Winder, Willard G. Warrington, and Donald R. Come, the President, Provost, Dean of University College, and head of the Department of Social Science, respectively, at the time of the second trial were added as Defendants. The case was again tried to a jury for approximately twelve days, commencing on December 18, 1979 and ending with a jury verdict on January 5, 1980. The jury found that activity protected by the First Amendment was a substantial or motivating factor in non-reappointment and that Hildebrand would have been reappointed if the First Amendment activity had not occurred. The jury found that the outcome of a Departmental Advisory Committee election and criticism of conditions within the department were protected activity which motivated Defendants, but that Hildebrand's candidacy for the Departmental Advisory Committee was not a motivating factor. The jury found that Plaintiff had not been denied due process. They found that Defendants Dunham (the department chairman) and Snyder (Dunham's assistant) acted with knowledge or a malicious intention to deprive Plaintiff of constitutional rights. They found that Plaintiff should be reinstated and awarded back pay totaling $249,292. They also found that Plaintiff was entitled to other compensatory damages of $100 and punitive damages of $50 each against Defendants Dunham and Snyder. (115a-120a)

Judgment was entered pursuant to the jury verdict on February 8, 1980. By Order of the Court entered that same date, Plaintiff was ordered reinstated at the beginning of Spring term 1980.

In response to motion by Defendants for judgment notwithstanding the verdict and for a new trial, Judge Miles issued an Opinion on September 9, 1980 granting Defen-

dants' motion for judgment notwithstanding the verdict. Judge Miles also conditionally granted Defendants' motion for a new trial. Judgment was entered in accordance with the Court's opinion on September 11, 1980. Hildebrand again appealed to the Court of Appeals. The Court of Appeals affirmed on the ground that Dr. Hildebrand would have been denied tenure regardless of his First Amendment protected activities.

THE COURT OF APPEALS STATEMENT OF FACTS

The Court of Appeals set forth the following statement of facts:

> "Dr. Hildebrand was a tenured professor of Economics at Texas Technological University. In 1967, he accepted a position as Associate Professor of Social Science at Michigan State. He also had a joint appointment at Michigan State's Latin American Studies Center. Dr. Hildebrand's post as Associate Professor was a 'tenure track' position. His Associate Professorship was to last for two years. He would acquire tenure if he was reappointed after this two year period.
>
> Dr. Hildebrand started teaching at Michigan State in the Fall of 1967. At that time, the Department of Social Sciences prescribed severe curriculum requirements. Professors in the department were expected to teach social science courses according to a prescribed curriculum, and were required to administer a standardized examination. Dr. Hildebrand criticized these requirements. He thought that they substantially restricted his teaching.
>
> During 1967 and 1968 Michigan State was expanding its faculty. Over half the members of the department were untenured. Dr. Hildebrand and some of his untentured colleages decided that the department needed a different perspective. As a consequence, they decided to run for a position on the Departmental Advisory Com-

mittee (DAC). The DAC was composed of five elected faculty members. It served as a department curriculum committee and advised the department chairman on various departmental matters, including tenure. Until 1968, a majority of the membership of the DAC was always tenured faculty.

Three untenured faculty members were supported as candidates for the DAC. These candidates were Drs. Puhek, Wagman, and Hildebrand. Each was elected. The election of these three untenured faculty members, combined with one holdover non-tenured DAC member resulted in a DAC in which four out of five members were non-tenured. Some faculty members greeted his sudden change in the composition of the DAC with consternation. They thought that there had been block voting by the non-tenured faculty.

On June 23, 1968, a joint meeting took place between the old DAC and the incoming DAC. Dr. Clinton A. Snyder, who acted as secretary at the Advisory Committee meetings, spoke up at this meeting. He stated that the outcome of the DAC election was due to a conspiracy among certain faculty members, and that this was a 'rotten or stinking fish'. Dr. Douglas Dunham, the department chairman, was sufficiently disturbed by the DAC election result that he called in the untentured faculty members to discuss the DAC election with them.

While this controversy over the DAC election brewed, Dr. Hildebrand's tenure determination was approaching. Dr. Hildebrand met with Department Chairman Dunham on June 2, 1968. The two men had what was apparently a full and frank discussion. At that meeting, Dr. Hildebrand formally requested that he be considered for tenure.

The tenure process at Michigan State in 1967 went as follows: The department chairman consulted with the

DAC concerning the tenure candidate's suitability for tenure. Following this input, the department chairman forwarded his written recommendation to the Dean of the College in question. The Dean would meet with the department chairman to discuss the recommendation. The Dean could reject the department's recommendation or forward it with his concurrence to the academic vice-president of the University, the Provost. The Provost would review the case and add his recommendation. The recommendations were then forwarded to the President of the University. The Board of Trustees took the final action on tenure.

The Department Chairman ordinarily consults with the DAC on tenure decisions. In Dr. Hildebrand's case, however, Dr. Dunham deviated from the practice of consulting with the DAC in his department. On July 2, 1968, he consulted with the full, tenured professors in the Department concerning Dr. Hildebrand. On that date, the full professors in the Department met with Dr. Dunham and reviewed Dr. Hildebrand's qualifications. These professors voted unanimously to recommend that Dr. Hildebrand not be granted tenure. Dr. Dunham took this recommendation under advisement. At that time, Dr. Hildebrand was away from the University for the summer. On September 11, 1968, Dr. Dunham wrote to the Dean of the College, Dean Edward A. Carlin, recommending that Dr. Hildebrand not be granted tenure. The next day, Dr. Dunham informed Dr. Hildebrand by letter of his recommendation and of the tenured faculty's recommendation at the July 2 meeting. Dr. Hildebrand met with Dr. Dunham and requested that he be allowed to meet with the full professors to try to persuade them to change their views. Dr. Dunham agreed to this request and arranged a meeting between Dr. Hildebrand and the tenured faculty. Dean Carlin held up action on the tenure issue pending the outcome of the meeting.

The meeting took place on September 23, 1968. Dr. Hildebrand addressed his tenured colleages and presented the reasons he should be granted tenure. During the meeting, several of the tenured faculty explained their reservations to him. Dr. Hildebrand was then excused and the full professors again deliberated. Once again, the professors voted unanimously to recommend that tenure be denied. Dr. Dunham again concurred in this recommendation, and so informed Dean Carlin. Dean Carlin, endorsed the recommended denial of ten ure and forwarded it to the Provost. Final action took place on November 21, 1968 when the Board of Trustees voted to deny tenure to Dr. Hildebrand. Dr. Hildebrand's employment at Michigan State ended on August 31, 1969.

For the past twelve years Dr. Hildebrand has been contesting his denial of tenure in one forum or another. He complained to the American Association of University Professors. He tried a series of intra-University appeals. He also filed two unfair labor practice charges with the Michigan Employment Relations Commission.

In this federal suit, originally filed in 1971, Dr. Hildebrand claimed that he was denied tenure in retaliation for the exercise of his First Amendment rights. Specifically, he claimed that he was denied tenure 1) because he criticized the uniform department curriculum, and 2) because he ran for the DAC. The jury agreed with his claims. The district court did not." (2nd Court of Appeals Opinion, pp 2-6; footnotes have been omitted.) (2a-6a)

Footnote 6 to the Court of Appeals Opinion is as follows:

"Dr. Hildebrand took his case to the DAC, the committee to which he and his untenured colleages had been elected. The DAC passed a resolution finding no reason for his denial of tenure. Dr. Hildebrand also

appealed to the University Faculty Tenure Committee. In addition, in 1972, Dr. Hildebrand sought to utilize reformulated University appeal procedures, but was rebuffed." (2nd Court of Appeals Opinion, p 6.) (6a)

FACTS NOT NOTED BY THE COURT OF APPEALS.

1. University rules state that "Information for tenure system action is gathered in the early part of the Fall term . . ." (Plaintiff's Exhibit 14, pp 8, 9.) (121a)

2. Hildebrand testified as follows:

"Q Was any information ever gathered for your tenure system action, to your knowledge?

A Not to my knowledge." (Reporter's Transcript, p 240)

Defendants' witness Klein testified as follows:

"Q Did Professor Dunham to your recollection pass out any materials at that meeting?

A I don't recall.

Q You do not recall receiving any materials?

A No." (Klein Deposition, p 16)

3. Among the items to be considered in accordance with the University rules are "international program assignment—committee and administrative services." (Plaintiff's Exhibit 14, pp 8, 9) (121a)

4. The director of the Latin American Studies Center, where Hildebrand held his joint appointment, was not consulted regarding the tenure decision and testified as follows:

"Certainly he was very much above average. You could even call it excellent. Superior rating. Those are qualitative judgments. It's hard to say, but I would say the very top." (Reporter's Transcript, p 523.)

5. Professor Puhek testified as follows:

"I would say that certainly he fell into the top third of the department." (Reporter's Transcript, p 155)

Professor Wagman testified as follows:

"I would rate him quite highly in terms of most of the dimensions in which—which were important in the department: Research, committee performance. I did not have any access to his classes, and so I don't know anything very much about his classes. I—the impressions that I form on the basis of my acquaintance and discussion with him in departmental meetings and on committees were favorable, and on many dimensions I would rank him among the top members of the department." (Reporter's Transcript, p 587, 588)

Professor Lombardi testified as follows:

"I think I could. I think that he would rank pretty high in the department. In the top one-third or so." (Reporter's Transcript, p 734)

6. The operative document under which Hildebrand's employment was terminated is referred to as the "recommendation form for tenure action" and, although it was obtained by discovery and admitted in evidence as Plaintiff's Exhibit 66, its contents are not discussed in the Court of Appeals Opinion. That document gives Hildebrand's overall performance as "average". (127a) Among the items listed as "average" was his international program assignments. (127a) The report does not mention Dr. Hildebrand's election to the Departmental Advisory Committee or his criticism of instructional policy as such, but evaluates Dr. Hildebrand's committee and administrative services as below average and states as a reason that he was ". . . openly irritated by requests for his time and energies involving a group task." (134a)

7. Dr. Puhek testified as to the departmental policy regarding tenure as follows:

> "As far as I know, no one in our department during the time I have been there, who wanted tenure, was in the tenure stream, and got the doctoral degree. None of those was denied tenure." (Reporter's Transcript, p 178.)

8. Dr. Hildebrand testified that Defendant Snyder admitted that the reason given for Hildebrand's termination—that he did not "fit in"—actually meant that he had been elected to the Departmental Advisory Committee using the following language:

> "December, yes, I did. At the end of one of our Departmental Advisory Committee meetings, late in November I stopped by Clint's office, and I said, 'Clint, how could you vote for me for a two-year position on the Advisory Committee, and then five weeks later vote to terminate me from the university?' And Clint Snyder's response was, 'The first vote came before I knew you didn't fit it.' And, I responded, 'What do you mean I don't fit in? I just won election by a clear majority of the faculty.' And Clint Snyder then responded that, 'None of you four young squirts elected to the Advisory Committee will ever receive tenure, and years from now you will be saying it was because of the election on May 23rd, 1968.' " (Reporter's Transcript, p 236)

9. Dr. Puhek testified that the elected DAC had been asked for its recommendation on all matters of tenure from 1966 through the present, with one exception as follows:

> "Q And what were those cases?
>
> A Well, there was only one. It was the Hildebrand decision." (Reporter's Transcript, p 172)

Dr. Puhek also testified that the same Advisory Committee which Defendants did not consult regarding Hildebrand provided advice for other tenure matters as follows:

"Q Did that Advisory Committee have occasion to pass on other tenure matters?

A Yes, it did." (Reporter's Transcript, p 173)

10. The report of the A.A.U.P. on their investigation of the matter was addressed to Defendant Dunham, admitted in evidence as Plaintiff's Exhibit 28 and is dated February 19, 1969, approximately three months after the action of the Board of Trustees on November 22, 1968. Among the things noted in this report are the following:

". . . During the course of our conversation, we found substantial agreement with you on the following procedural rules which should revail in tenure decisions as follows: . . .

3. That a decision in the case of a non-tenured faculty member should not be arbitrary, capricious, or discriminatory; that is to say that it should rest on standards of professional performance applied consistently in similar cases."

"In discussing the Hildebrand decision with you, it was our conclusion that the requirements of items one and two above, were satisfactorily met, but we have serious doubt on the basis of your account that the requirements of rule three were satisfied. The core purpose of any set of procedural rules in tenure cases, we believe, is to assure, in so far as it is possible for men of integrity and reason to do so, that substantial due process by afforded the faculty member whose tenure is being judged. The essence of substantial due process is that:

(a) A decision by (sic) made on the basis of a serious attempt to obtain relevant evidence;

(b) That the person being evaluated be given a full opportunity to present evidence in his own behalf and to rebut evidence presented against him, directly to all those who are judging him;

(c) That those who evaluate this evidence are competent and authorized to do so;

(d) That the decision be made after and only after all the evidence has been presented. At the departmental level this requires that only those who have analyzed and evaluated the evidence be permitted to render a decision.

We believe that you did agree with us that only if these procedures were followed could one be satisfied that substantial due process has been afforded, and that only in this way could one minimize the danger of an arbitrary, capricious or discriminatory decision on tenure matters.

It is clear from your account of the manner in which the decision was made in Dr. Hildebrand's case, (which also checks with Dr. Hildebrand's account) that none of the above requirements were met. Most important, Dr. Hildebrand was not given an opportunity to present evidence on his own behalf, nor to rebut evidence against him before a decision was reached by your senior faculty. Indeed, it is hard to see how he could have done so unless clear and tangible reasons for his non-renewal were reduced to writing and presented to him in adequate time to allow a defense to be prepared. Even after the decision was made, you have refused his request to state in written form the reasons for the adverse decision. You have also refused our request that you give him such reasons in writing."

. . .

"As for his teaching and research and publication records, you stated that he was seriously interested in the

former, and that you believed him now to be an adequate instructor. You found no fault with his publication and research performance. As for Dr. Hildebrand's concern for the Department, we note that he was elected by his colleagues to the Department's Advisory Committee, and that he serves on that Committee. . . ." (122a-125a)

THE DECISION OF THE COURT OF APPEALS.

The Court of Appeals noted the threshold question as to whether the Plainitff's conduct deserves constitutional protection, but did not specifically decide it. The Court of Appeals also noted the employee's burden to show that the protected conduct was a "substantial factor" or a "motivating factor" in the employer's decision not to rehire him. The Court of Appeals then noted that once the employee meets this burden, the burden of proof shifts to the employer to prove that the employee would have been fired absent the protected conduct. (2nd Court of Appeals Opinion, p 7.) (7a)

The Court of Appeals specifically decided only one issue with the following language:

> "We agree with the district court that evidence clearly showed that Dr. Hildebrand would have been denied tenure regardless of his First Amendment protected activities." (9a)

The reasoning of the Court of Appeals is set forth as follows:

> "The tenure process at Michigan State involves many steps. There was no reason for the Dean of the University College, the Provost, or the Board of Trustees to deny tenure or recommend the denial of tenure because of Dr. Hildebrand's activities. The jury apparently agreed, because it ruled in favor of all defendants except Dr. Dunham, the department chairman, and Dr. Snyder, his assistant. Dr. Dunham based his decision on

a recommendation received from the department's tenured faculty members.

In July of 1968 he convened all of the *tenured* faculty members who were available to seek their advice as to whether Dr. Hildebrand should be accorded tenure. They voted unanimously that he sbould not recieve tenure.

When Dr. Hildebrand returned from summer vacation, he asked for and received an opportunity to address the tenured faculty to try to convince them to change their recommendation. After hearing his reasons, the tenured faculty again voted unanimously to recommend against his being granted tenure. The tenured faculty's vote was based on their perception that Dr. Hildebrand did not fit into a multi-disciplinary department, but was better suited for a single disciplinary department such as Economics or Latin American Studies. The plaintiff produced no evidence to show impermissible motive on the part of any faculty member, other than Dr. Snyder. It is true that Dr. Dunham, as department chairman, recommended that Dr. Hildebrand not be granted tenure. However, he acted pursuant to the tenured faculty's recommendation. That recommendation was advisory in nature. The tenured faculty based their recommendation on constitutionally permissible reasons. As a consequence, under these circumstances Dr. Dunham's recommendation that Hildebrand not be granted tenure cannot be challenged. Therefore, even if we assume that Dr. Hildebrand', conduct was protected by the First Amendment, we hold that his tenure denial was not based upon his exercise of that protected conduct." (2nd Court of Appeals Opinion, pp 9, 10.) (9a, 10a)

The Court of Appeals discussed the standard for granting J.N.O.V. only as follows:

> "The standard for granting J.N.O.V. is well established. All evidence and inferences therefrom must be read in favor of the party opposing the J.N.O.V. A court cannot weigh the evidence. Only if there is but one reasonable conclusion as to the proper verdict can J.N.O.V. be granted." (citations omitted) (2nd Court of Appeals Opinion, p 8.) (8a)

REASONS FOR GRANTING A WRIT

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER STANDARD OF REVIEW IN A CASE WHERE THE PARTY SEEKING A DIRECTED VERDICT OR J.N.O.V. HAS THE BURDEN OF PROOF.

It appears that the Court of Appeals recognized that Defendants had the burden to show by ". . . a preponderance of the evidence that it would have reached the same decision as to respondent's re-employment even in the absence of the protected conduct." *Mt. Healthy City Board of Ed* v *Doyle*, 429 US 274, 287 (1977). Although we are aware of no Sixth Circuit case, it appears that every other Circuit that has addressed the question has determined that some separate consideration should be given to the benefit of the burden of proof in passing on a motion for J.N.O.V. See 5A Moore's Federal Practice ¶50.02 (2nd ed). The rule is set forth as follows in *Federal Insurance Company* v *Summers*, 403 F2d 971, 975-976 (1st Cir, 1968):

> "We reach this conclusion by adhering to well-established legal principles. It is a rare case where the proponent is entitled to a directed verdict, *Roche* v. *New Hampshire Nat'l Bank*, 192 F.2d 203 (1st Cir. 1951), and indeed, the only case, where a directed verdict would be warranted would be where the propo-

> nent's (i.e., defendant's) evidence establishing a *prima facie* case is uncontradicted and unimpeached. See, e.g., *Chesapeake & O.R. Co.* v. *Martin*, 283 U.S. 209, 51 S.Ct. 453, 75 L.Ed. 983 (1931); *National Dynamics Corp.* v. *Petersen Publishing Co.*, 185 F.Supp. 573 (S.D.N.Y.1960). See generally 5 Moore's Federal Practice 2319 (2d ed. 1968). Even where the proponent's evidence is uncontradicted, a directed verdict would not be proper if the evidence gives rise to conflicting inferences, see, e.g., *Readnour* v. *Commercial Standard Ins. Co.*, 253 F.2d 907 (10th Cir. 1958), or where the case is totally dependent on the credibility of a witness. See, e.g., *Powers* v. *Continental Cas. Co.*, F.2d 386 (8th Cir. 1962); *Polhemus* v. *Water Island, Inc.*, 252 F.2d 924 (3rd Cir. 1958)."

The failure of the Sixth Circuit to consider the benefit of the burden of proof had an obvious impact on its decision. A brief review of the analysis of the Court of Appeals decision will reveal how clearly the Court of Appeals departed from the standard established by the other Circuit Courts.

> 1. "There was no reason for the Dean of the University College, the Provost, or the Board of Trustees to deny tenure or recommend the denial of tenure because of Dr. Hildebrand's activities." (Court of Appeals Opinion, p 9) (9a)

The obvious reason for the decision of those at higher levels in the University was that this was the recommendation submitted to them by the departmental chairman. The instant case is unusual in that the report which was approved at higher levels does contain evidence of improper motivation. However, in many cases it will be a practical impossibility for anyone to prove that those at higher levels in the University who accepted the recommendations of those made at the lower levels were improperly motivated. Unless serious consideration is given to the Defendants' burden of proof, the First Amendment rights of those who

teach at public institutions of higher learning will be meaningless. The Court of Appeals Opinion does not refer to any evidence that indicates there was any attempt by the higher-ups to independently evaluate Dr. Hildebrand. (The nearest thing to such evidence referred to in the District Court Opinion is at footnote 14, in which reference is made to the fact that the President of the University testified that the Provost "indicated" to him that "due process" had not been violated and that these things had taken place prior to the time when he was at the University. The President at the time of the termination did not testify.) (40a)

> 2. "The jury apparently agreed, because it ruled in favor of all Defendants except Dr. Dunham, the department chairman, and Dr. Snyder, his assistant." (Court of Appeals Opinion, p 9) (9a)

If true, this statement would not support a J.N.O.V. but could be used to argue that the jury verdict was inconsistent. However, this particular statement is simply not true. Jury Interrogatory No. 2 is as follows:

> "2. Were the following actions or events a substantial or motivating factor in the decision that the plaintiff, John R. Hildebrand not be reappointed:
>
> (a) Plaintiff's criticism of conditions within the department of Social Science. Yes _X_ No ____
>
> (b) Plaintiff's candidacy for the departmental advisory committee. Yes ____ No _X_
>
> (c) The outcome of the May 23, 1968 election. Yes _X_ No ____" (116a)

Jury Interrogatory No. 3 is as follows:

> "3. (a) If you answered 2(a) above 'yes,' then answer the following interrogatory: Do you find that plaintiff would have been terminated even if he had not criticized the conditions within his department?
> Yes ____ No _X_

(b) If you answered 2(b) above 'Yes,' then answer the following interrogatory: Do you find that plaintiff would have been terminated even if he had not been a candidate for the departmental advisory committee? Yes ____ No ____

(c) If you answered 2(c) above 'Yes,' then answer the following interrogatory: Do you find that plaintiff would have been terminated even if the outcome of the May 23, 1968 election had been different? Yes ____ No __X__" (116a, 117a)

Jury Interrogatory No. 4 is as follows:

"4. If the following defendants' acts or conduct was substantially motivated by retaliation against the plaintiff for the exercise of first amendment rights, would such defendant have acted to deny reappointment to the plaintiff even in the absence of his first amendment activities?

Dr. Clifton R. Wharton	Yes ____	No __X__
Dr. John E. Cantlon	Yes ____	No __X__
Dr. Edward A. Carlin	Yes ____	No __X__
Dr. Douglas Dunham	Yes ____	No __X__
Dr. Clinton A. Snyder	Yes ____	No __X__"

(117a)

With due respect to the judges of the Court of Appeals, it appears that either they did not look at the jury verdict or they completely misunderstood the impact of the juries' findings. It is true that in Interrogatory No. 6 the jury found that only Defendants Dunham and Snyder acted in bad faith. Whether the Defendants acted in bad faith impacts upon their qualified immunity and personal liability under *Wood* v *Strickland*, 420 US 308 (1975), but in no way makes their actions lawful. The fact that only some of the Defendants acted in bad faith is absolutely no evidence that either those Defendants or any other Defendants acted lawfully. Apparently, the Court of Appeals feels that when there are multiple defendants and any one of those

defendants is able to establish a qualified immunity, the jury verdict can be utilized as evidence to rebut the jury's own verdict as to other defendants. It is submitted that this position is so clearly erroneous and such a pernicious precedent that it must be corrected by this Court.

> 3. "The plaintiff produced no evidence to show impermissible motive on the part of any faculty member, other than Dr. Snyder. It is true that Dr. Dunham, as department chairman, recommended that Dr. Hildebrand not be granted tenure." (Court of Appeals Opinion, p 10) (10a)

This statement illustrates how clearly the Court of Appeals erred in their application of the standards used by other Circuits in passing on a J.N.O.V. in those cases where the person requesting such a grant has the burden of proof. The Court of Appeals recognized that the department chairman and his assistant were improperly motivated. The Court of Appeals also noted that "some faculty members greeted this sudden change in the composition of the DAC with consternation." (3a, 4a) The Court of Appeals refers to no evidence relating to the impact of this "consternation" on the tenure decision.

As the Court said in *Mihalchak* v *American Dredging Company*, 266 F2d 875, 877 (3rd Cir, 1959):

> "The propriety of directing a verdict in appropriate situations in favor of the party imposed initially with the risk of non-production of evidence seems to be well settled. Yet though a motion for directed verdict in favor of the proponent of an issue is cast in the same form as when made by the defending party, it requires the judge to test the body of evidence not for its insufficiency to support a finding, but rather for its overwhelming effect."

Rather than testing the evidence to see whether the Defendants had presented overwhelming evidence that the Plaintiff would have been discharged without the protected

activities, the Court of Appeals would require the *Plaintiff* to produce additional evidence showing impermissible motive of other faculty members.

II. THE DECISION BELOW IS IN DIRECT CONFLICT WITH DECISIONS OF THE SUPREME COURT REGARDING THE APPROPRIATE EVIDENTIARY GUIDELINES.

As the Court of Appeals Opinion notes, the tenure meeting regarding Hildebrand took place on July 2, 1968. University bylaws required that information be gathered for this purpose in the *Fall* of the year. In fact, Defendants gathered no information at any time. The Court of Appeals Opinion also notes that the department chairman "ordinarily consults with the DAC on tenure decisions", but did not in the instant case. A majority of the DAC testified that Hildebrand's performance was in the upper portion of those in the department. University bylaws required that international program assignments be considered, but Defendant Dunham did not consult the director of the Latin American Studies Center who testified that Hildebrand's performance was "the very top". The AAUP report, which was based on Defendant Dunham's own account of the matter, and admitted in evidence, also noted that the decision was not made on the basis of a serious attempt to obtain relevant evidence and that those who evaluated the evidence were not authorized to do so. It is clear that the meeting was a sham.

These deviations from the normal procedure should be considered in light of the following guidelines from *Arlington Heights* v *Metropolitan Housing Corp*, 429 US 252, 267, (1977):

> "Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be

relevant, particularly if the factors usually considered important by the decision-maker strongly favor a decision contrary to the one reached."

The Court in *Arlington Heights* noted at footnote 21 that the nature of the proof of intent was similar in a First Amendment case such as *Mt. Healthy School District* v *Doyle, supra*. Thus, under the guidelines approved by this Court, the evidence upon which the Court of Appeals relied to set aside the jury verdict actually *supports* the verdict.

The massive procedural and substantive departures are clear. The inference to be drawn from these departures was for the jury, which apparently drew the same inference as did the AAUP. The guidelines set forth in *Arlington Heights* were argued to the Court of Appeals but not mentioned in its Opinion. Under the circumstances, the only conclusion which follows is that the Court of Appeals has declined to follow this Court's decision in *Arlington Heights*.

III. THE DECISION BELOW CONSTITUTES A DENIAL OF THE RIGHT TO JURY TRIAL BY A COMMON BUT UNWARRANTED JUDICIAL RELUCTANCE TO ENFORCE THE FIRST AMENDMENT WITHIN PUBLIC COLLEGES AND UNIVERSITIES.

A. The Lower Courts Failed To Understand The Importance Of The First Amendment In The University Setting.

The importance of the role of the courts in safeguarding academic freedom has often been emphasized by this Court. For instance, as the Court stated in *Sweezy* v *New Hampshire*, 354 US 234, 250 (1957):

"The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To

> impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."

We do not perceive any change in this attitude in the more recent decisions of this Court, although the Court has had occasion to correct decisions which were unduly restrictive of First Amendment rights. See *Givhan* v *Western Line Consolidated School District*, 439 US 410 (1979).

In contrast to the views of the Supreme Court, the District Judge set forth his basic philosophy about this case as follows:

> "The assumption that federal courts can operate colleges and universities located long distances away in a manner superior to those operating such institutions is fallacious." (District Court Opinion, p 24) (34a)

In justifying his action in the first trial, the District Judge quoted the following from *Jones* v *Hopper*, 410 F2d 1323, 1329 (10th Cir, 1969):

> "It would be intolerable for the courts to interject themselves and to require an educational institution to hire or maintain on its staff a professor or instructor whom it deemed undesirable and did not wish to employ. For the courts to impose such a requirement would be an interference with the operation of institutions of higher learning contrary to established principles of law and to the best traditions of education." (100a)

While the District Judge did not hesitate to set forth his reasons for setting aside the jury verdict, the decision of the Court of Appeals is less explicit. The Court of Appeals Opinion acknowledges that the department chairman and his assistant were substantially motivated to retaliate against Plaintiff because of the exercise of First Amendment rights. However, rather than critically evaluating the evidence relating to Hildebrand's performance, the Court of Appeals simply accepts the District Court's judgment that Hildebrand would have been terminated regardless of the exercise of his First Amendment rights.

B. The Evidence In Support Of The Jury Verdict Is Overwhelming.

It is respectfully submitted that the evidence that absent improper motivation the Plaintiff would have been reappointed is so overwhelming that the action of the District Court and the Court of Appeals on this issue amounts to an unconstitutional denial of jury trial. This failure to follow the Constitution is such a gross departure from normal judicial proceedings as to mandate the intervention of this Court. Even if the standard applied by the Court of Appeals was proper, there can be no doubt that the Court of Appeals was in error. The consideration of a number of aspects of this evidence, any *one* of which would be sufficient to support the jury verdict, will illustrate this.

1. The denial of tenure to Hildebrand was the only time that tenure had been denied to a member of the department in the tenure stream who had obtained a doctorate degree. It is therefore a reasonable inference that Hildebrand would have obtained tenure absent the improper motivation of the departmental chairman and his assistant.

2. Even giving *Defendants* every benefit of the doubt, the recommendation of the tenure committee, which purportedly included the advice of those with whom Defendant Dunham consulted with as well as his own

evaluation, rated Hildebrand as "average". (127a) It is a reasonable inference that an "average" faculty member would have been granted tenure absent the retaliation because of the protected activity. (In fact, the jury could have found that Hildebrand's actual performance was far above "average". Three witnesses constituting a majority of the elected DAC testified that his performance was in the upper portion of those within the department. Although rated "average" in the recommendation on his international program assignments, his actual performance was at the "very top". Although rated "below average" in his committee performance, his colleagues were so highly impressed with him that he was one of five from the entire department elected to the Departmental Advisory Committee.)

3. As the Court of Appeals noted, there was testimony that Hildebrand and others made certain constructive criticisms. These constructive criticisms were characterized as Hildebrand being "openly irritated" in the recommendation form for tenure action. Since the recommendation of the department included as one of its reasons for the action the fact that Hildebrand had been "openly irritated" and since this report was never disclaimed by the higher-ups, it is, in fact, undisputed that one of the reasons for Hildebrand's termination was the fact that he was "openly irritated". Certainly under the holding of *Givhan* v *Western Line Consolidated School District*, 439 US 410 (1979), Hildebrand had a right to be "openly irritated". Since the recommendation form purported to contain the recommendation of the group with which Defendant Dunham consulted, this is direct evidence that not only the department chairman and his assistant but others involved in the tenure recommendation were improperly motivated.

4. Dr. Hildebrand testified that Defendant Snyder stated, when asked how it could be said that Hildebrand did not "fit in" when a majority of his colleagues had elected

him to the Departmental Advisory Committee, that this related to the outcome of the election. This admission by Defendant Snyder goes not only to his motivation but also is direct evidence that the others involved in the tenure decision were similarly motivated. As the Court of Appeals noted in its Opinion, the concern with the election went beyond Defendants Dunham and Snyder, but "some faculty members greeted this sudden change in the composition of the DAC with consternation." (3a, 4a) Thus, it is apparent that not only Defendants Dunham and Snyder, but those with whom Dunham consulted, were motivated to retaliate against Plaintiff because of the exercise of his First Amendment rights. It is certainly a reasonabe inference that those with whom Dunham consulted were motivated to do something about the composition of the DAC.

5. As noted above, under the guidelines established by *Arlington Heights* v *Metropolitan Housing Corp, supra,* 267, the procedures followed by the Defendants are evidence of the retaliation against the Plaintiff for the exercise of his First Amendment rights.

C. The Impact Of This Case On Those Wishing To Exercise First Amendment Rights Is Devastating.

It is apparent upon even the briefest review of the evidence that the Court of Appeals made no serious attempt to see if the evidence would support the jury verdict. The language used by the District Court in both its first and second Opinions makes it clear that it simply is unwilling to enforce the First Amendment as it relates to the rights of faculty members at public colleges and universities. Even the least perceptive faculty member can see the connection between Hildebrand's constructive suggestions for change and the claim that Hildebrand was better suited for a single disciplinary department. To claim that Hildebrand did not fit in the department when he had just been elected by his colleagues to the DAC is totally incredible. The instant case is one where the Defendants openly admitted their

retaliation against the Plaintiff and yet have, to this point, succeeded in terminating one of the best and most popular members of the department. The negative impact of such a case on others who wish to exercise their First Amendment rights can hardly be overstated.

D. The Issues Are Clearly Presented And Can Be Easily Reviewed By This Court.

This Court might understandably be reluctant to involve itself in an extensive review of the facts. However, the instant case does not require the Court to undertake that task. This is so for three reasons.

First, if the proper standard for consideration of the jury verdict is applied, it is clear that the Court need not, indeed, should not, weigh the evidence.

Second, the facts as set forth by the Court of Appeals make it clear that there was no basis for setting aside the jury verdict. The Court of Appeals Opinion itself notes the deviation from the normal procedure, the improper motivation of both Defendants Dunham and Snyder, as well as the "consternation" of the other faculty members.

Third, there are at least two documents which were admitted in evidence, either one of which, standing alone, would be sufficient to support the jury verdict. Either the AAUP report which was entered in evidence as Plaintiff's Exhibit 28 or the recommendation form for tenure action which was entered in evidence as Plaintiff's Exhibit 66, is sufficient to support the jury verdict.

CONCLUSION

For the reasons stated herein, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Sixth Circuit in this case.

Respectfully submitted,
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Date: February 9, 1982

Appendix

81-1517

Office - Supreme Court, U.S.
FILED
FEB 9 1982
ALEXANDER L. STEVAS,
CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

JOHN R. HILDEBRAND,
Petitioner,

-VS-

BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, CLIFTON R. WHARTON, President, Michigan State University; JOHN EDWARD CANTLON, Provost, Michigan State University; EDWARD A. CARLIN, Dean of University College, Michigan State University; DOUGLAS DUNHAM, CLINTON A. SNYDER, CECIL M. MACKEY, CLARENCE L. WINDER, WILLARD G. WARRINGTON, and DONALD R. COME,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

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TABLE OF CONTENTS

	Page
Opinion of the United States Court of Appeals for the Sixth Circuit, Docket No. 80-1618, decided and filed October 19, 1981	1a
Opinion of the United States District Court for the Western District of Michigan, Docket No. G 285-71 CA 5, filed September 9, 1980	11a
Judgment on decision by the Court of the United States District Court for the Western District of Michigan, file no. G 285-71, filed September 11, 1980	45a
Order Denying Petition for Rehearing by the United States Court of Appeals for the Sixth Circuit, filed December 1, 1981	46a
Opinion of the United States Court of Appeals for the Sixth Circuit, Docket No. 77-1435, decided and filed August 16, 1979	47a
Opinion of the United States District Court for the Western District of Michigan, file no. G 285-71 CA 5, filed March 18, 1977	64a
Jury Verdict in the United States District Court for the Western District of Michigan, file no. G 285-71 CA, dated January 5, 1980	115a
Plaintiff's Exhibit 14, Policy Handbook, portions of pages 8 and 9	121a
Plaintiff's Exhibit 28, letter from the council of the A.A.U.P. to Professor Douglas Dunham dated February 19, 1969	122a
Plaintiff's Exhibit 66, Recommendation Form for Tenure Action, dated September 11, 1968	127a

Opinion filed October 19, 1981

No. 80-1618

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOHN R. HILDEBRAND,
Plaintiff-Appellant,

v.

BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, *et al.*,
Defendants-Appellees.

APPEAL from the United States District Court for the Western District of Michigan.

Decided and Filed October 19, 1981.

Before: WEICK and KEITH, Circuit Judges, and HORTON,* District Judge.

KEITH, Circuit Judge. Plaintiff John R. Hildebrand was denied tenure at Michigan State University in 1968. Since then, he has tried to reverse his denial of tenure in a variety of forums. The plaintiff claimed that he was denied tenure in retaliation for the exercise of his first amendment rights. The jury below agreed with his claims. The district court overturned the jury's decision and entered judgment in favor of the defendant University. We affirm.

I.

This case is before us for the second time. In the initial appeal, we reversed and remanded because of procedural

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* Hon. Odell Horton, United States District Judge for the Western District of Tennessee, sitting by designation.

errors. *Hildebrand* v. *Board of Trustees of Michigan State University*, 607 F.2d 705 (6th Cir. 1979). On remand, the case was tried before a jury. The jury concluded: 1) that certain intra-departmental activity engaged in by Dr. Hildebrand was protected by the First Amendment; 2) that Dr. Hildeband was denied tenure because he engaged in this protected activity; and 3) that the defendant University had not shown that Dr. Hildebrand would have been denied tenure absent the protected activity. The jury awarded back pay, compensatory and punitive damages, and directed that Dr. Hildebrand be reinstated.[1]

The district court entered judgment on the jury's verdict and directed that Dr. Hildebrand be reinstated at Michigan State University ("Michigan State"). The defendants then filed motions for judgment notwithstanding the verdict (J.N.O.V.), or in the alternative, for a new trial. The district court issued an opinion on September 9, 1980, granting defendants' motion for judgment notwithstanding the verdict. The district court also conditionally granted defendants' motion for a new trial. The plaintiff has appealed from that judgment. The district court has directed that Dr. Hildebrand's reinstatement be continued pending this appeal.

II. FACTS

Dr. Hildebrand was a tenured professor of Economics at Texas Technological University.[2] In 1967, he accepted a position as Associate Professor of Social Science at Michigan

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[1] The jury ruled against the plaintiff's claims that he had been denied due process in his tenure denial. This ruling is fully supported by the record and is not challenged on appeal.

[2] Dr. Hildebrand received his Bachelor's Degree from the University of California at Berkeley, a Master's Degree from George Washington University, and a Ph.D. in Economics from the University of Chicago. Dr. Hildebrand spent several years as a Professor of Economics at Kansas State University, except for a short period when he served as a member of the Kansas legislature. He also spent eighteen months in Latin America, after which he joined Texas Tech's economics department.

State.[3] He also had a joint appointment at Michigan State's Latin American Studies Center. Dr. Hildebrand's post as Associate Professor was a "tenure track" position. His Associate Professorship was to last for two years. He would acquire tenure if he was reappointed after this two year period.

Dr. Hildebrand started teaching at Michigan State in the Fall of 1967. At that time, the Department of Social Sciences prescribed severe curriculum requirements. Professors in the department were expected to teach social science courses according to a prescribed curriculum, and were required to administer a standardized examination. Dr. Hildebrand criticized these requirements. He thought that they substantially restricted his teaching.

During 1967 and 1968 Michigan State was expanding its faculty. Over half the members of the department were untenured. Dr. Hildebrand and some of his untenured colleagues decided that the department needed a different perspective. As a consequence, they decided to run for a position on the Departmental Advisory Committee (DAC). The DAC was composed of five elected faculty members. It served as a department curriculum committee and advised the department chairman on various departmental matters, including tenure. Until 1968, a majority of the membership of the DAC was always tenured faculty.

Three untenured faculty members were supported as candidates for the DAC. These candidates were Drs. Puhek, Wagman, and Hildebrand. Each was elected. The election of these three untenured faculty members, combined with one holdover non-tenured DAC member resulted in a DAC in which four out of five members were non-tenured. Some faculty members greeted this sudden change in the composi-

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[3] Dr. Hildebrand's wife was also a professor at Texas Tech, and joined him in the move to Michigan State. She received tenure at Michigan State, and is currently teaching there.

tion of the DAC with consternation. They thought that there had been block voting by the non-tenured faculty.

On June 23, 1968, a joint meeting took place between the old DAC and the incoming DAC. Dr. Clinton A. Snyder, who acted as secretary at the Advisory Committee meetings, spoke up at this meeting. He stated that the outcome of the DAC election was due to a conspiracy among certain faculty members, and that this was a "rotten or stinking fish". Dr. Douglas Dunham, the department chairman, was sufficiently disturbed by the DAC election result that he called in the untenured faculty members to discuss the DAC election with them.

While this controversy over the DAC election brewed, Dr. Hildebrand's tenure determination was approaching. Dr. Hildebrand met with Department Chairman Dunham on June 2, 1968. The two men had what was apparently a full and frank discussion. At that meeting, Dr. Hildebrand formally requested that he be considered for tenure.

The tenure process at Michigan State in 1967 went as follows: The department chairman consulted with the DAC concerning the tenure candidate's suitability for tenure. Following this input, the department chairman forwarded his written recommendation to the Dean of the College in question.[4] The Dean would meet with the department chairman to discuss the recommendation. The Dean could reject the department's recommendation or forward it with his concurrence to the academic vice-president of the University, the Provost. The Provost would review the case and add his recommendation. The recommendations were then forwarded to the President of the University. The Board of Trustees took the final action on tenure.

The Department Chairman ordinarily consults with the DAC on tenure decisions. In Dr. Hildebrand's case, however, Dr.

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[4] In 1967, Michigan State had 17 colleges. The University College was one of these. The department of Social Science was one of four departments comprising this college. Edward A. Carlin was the Dean of University College during this time.

Dunham deviated from the practice of consulting with the DAC in his department. On July 2, 1968, he consulted with the full, tenured professors in the Department concerning Dr. Hildebrand. On that date, the full professors in the Department met with Dr. Dunham and reviewed Dr. Hildebrand's qualifications. These professors voted unanimously to recommend that Dr. Hildebrand not be granted tenure. Dr. Dunham took this recommendation under advisement. At that time, Dr. Hildebrand was away from the University for the summer. On September 11, 1968, Dr. Dunham wrote to the Dean of the College, Dean Edward A. Carlin, recommending that Dr. Hildebrand not be granted tenure. The next day, Dr. Dunham informed Dr. Hildebrand by letter of his recommendation and of the tenured faculty's recommendation at the July 2 meeting. Dr. Hildebrand met with Dr. Dunham and requested that he be allowed to meet with the full professors to try to persuade them to change their views. Dr. Dunham agreed to this request and arranged a meeting between Dr. Hildebrand and the tenured faculty. Dean Carlin held up action on the tenure issue pending the outcome of the meeting.

The meeting took place on September 23, 1968. Dr. Hildebrand addressed his tenured colleagues and presented the reasons he should be granted tenure. During the meeting, several of the tenured faculty explained their reservations to him. Dr. Hildebrand was then excused and the full professors again deliberated. Once again, the professors voted unanimously to recommend that tenure be denied.[5] Dr. Dunham again concurred in this recommendation, and so informed Dean Carlin. Dean Carlin, endorsed the recommended denial of tenure and forwarded it to the Provost. Final action took place on November 21, 1968 when the Board of Trustees voted to deny

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[5] It appears that all tenured full professors voted against tenure for Dr. Hildebrand at both the July 2 and September 23 meetings. There may have been one or two tenured associate professors who did not vote on tenure, but the record is not clear.

tenure to Dr. Hildebrand. Dr. Hildebrand's employment at Michigan State ended on August 31, 1969.

For the past twelve years Dr. Hildebrand has been contesting his denial of tenure in one forum or another. He complained to the American Association of University Professors. He tried a series of intra-University appeals.[6] He also filed two unfair labor practice charges with the Michigan Employment Relations Commission.

In this federal suit, originally filed in 1971, Dr. Hildebrand claimed that he was denied tenure in retaliation for the exercise of his First Amendment rights.[7] Specifically, he claimed that he was denied tenure 1) because he criticized the uniform department curriculum, and 2) because he ran for the DAC. The jury agreed with his claims. The district court did not.[8]

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[6] Dr. Hildebrand took his case to the DAC, the committee to which he and his untenured colleagues had been elected. The DAC passed a resolution finding no reason for his denial of tenure. Dr. Hildebrand also appealed to the University Faculty Tenure Committee. In addition, in 1972, Dr. Hildebrand sought to utilize reformulated University appeal procedures, but was rebuffed.

[7] As we note in n. 1, *supra*, the plaintiff also claimed that his due process rights were abridged. The jury's adverse finding on this issue is not challenged on appeal.

[8] In our initial opinion in this case, we commented that the first trial presented a "procedural nightmare". 607 F.2d at 712. On remand, the district court succeeded in turning the second trial into another procedural nightmare. This happened because the district court interpreted our order of reversal and remand for a trial by jury "on all issues" as mandating a jury trial on all legal as well as equitable issues. For this reason, the district court submitted the issues 1) of whether Dr. Hildebrand's conduct was protected by the First Amendment, 2) whether Dr. Hildebrand should be reinstated, and 3) whether Dr. Hildebrand should receive back pay to the jury. The first issue is one of law and should not have been submitted to the jury. It is for the judge to weigh the factors and make a decision as to whether a plaintiff's conduct was protected by the First Amendment. *See Schneider* v. *City of Atlanta*, 628 F.2d 915 (5th Cir. 1980); *Bernasconi* v. *Tempe Elementary School Dist. No. 3*, 548 F.2d 857, 862 (9th Cir.), *cert. denied*, 434 U.S. 825 (1977). Similarly, as was noted in both the majority and concurring opinions, issues relating to reinstatement and back pay are equitable, and thus are decided by the judge.

Opinion filed October 19, 1981

III.

The law in this area has been outlined in a series of Supreme Court opinions: *Pickering* v. *Board of Education*, 391 U.S. 563 (1968); *Perry* v. *Sindermann*, 408 U.S. 593 (1972); *Mt. Healthy School District* v. *Doyle*, 429 U.S. 274 (1977); *Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410 (1979). The threshold question is whether the plaintiff's conduct deserves constitutional protection. In a public educational setting, a Court applies a balancing test in determining whether conduct is protected by the First Amendment. A court must balance "the interests of the [teacher] as a citizen in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Givhan*, *supra* at 414, quoting *Pickering*, *supra* at 568. If a court finds that an employee's conduct was protected by the First Amendment, the finder of fact must determine whether the employee was fired because he engaged in the protected conduct. The employee's protected conduct must be a "substantial factor" or a "motivating factor" in the employer's decision not to rehire him. *Doyle*, *supra* at 287; *Givhan*, *supra* at 416. Once the employee meets this burden, the burden of proof shifts to the employer to prove that the employee would have been fired absent the protected conduct. *Givhan*, *supra* at 416; *Doyle*, *supra* at 287.

In this case, the district court submitted all three issues to the jury. The jury concluded that Dr. Hildebrand's conduct in complaining about the curriculum and running for a seat on the DAC was protected by the First Amendment. The jury further found that this was a substantial reason why Dr. Hildebrand was denied tenure. Finally, the jury found that Dr. Hildebrand would have been granted tenure absent the protected conduct in question.

As noted, the district court granted J.N.O.V. and overturned

the jury's decision. The district court also conditionally granted defendants' motion for a new trial. Thus, the key issue is whether the district court properly granted the motion for J.N.O.V.

The standard for granting J.N.O.V. is well established. All evidence and inferences therefrom must be read in favor of the party opposing the J.N.O.V. A court cannot weigh the evidence. Only if there is but one reasonable conclusion as to the proper verdict can J.N.O.V. be granted. *See Standard Alliance Industries, Inc.* v. *Black Clawson Co.*, 587 F.2d 813, 823 (6th Cir. 1978), *cert. denied*, 441 U.S. 923 (1979); *Morelock* v. *NCR Corp.*, 586 F.2d 1096, 1104 (6th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979).

IV.

The first question is whether Dr. Hildebrand's activities were protected by the First Amendment. We find this issue to be troubling. The *Pickering* balancing test is difficult to apply.[9]

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[9] *See Schmidt* v. *Fremont County School Dist. No. 25*, 558 F.2d 982 (10th Cir. 1977) (comments concerning career education policy and football reserved ticket sales not protected by the First Amendment); *Hetrick* v. *Martin*, 480 F.2d 705 (6th Cir.), *cert. denied*, 414 U.S. 1075 (1973). *See also D'Andrea* v. *Adams*, 626 F.2d 469 (5th Cir. 1980), *cert. denied*, —— U.S. ——, 101 S.Ct. 1365 (1981) (statements by professor to legislative officials concerning allegedly improper use of university funds protected by First Amendment); *McGill* v. *Board of Education of Pekin Elementary School*, 602 F.2d 774 (7th Cir. 1979) (teacher's statements concerning collective bargaining agreement of sufficient public concern to be protected by First Amendment); *Megill* v. *Board of Regents of State of Florida*, 541 F.2d 1073 (5th Cir. 1976) (series of boisterous, inaccurate public statements by professor not protected by First Amendment).

Decisions in this area vary and are difficult to reconcile. *See, e.g., Atcherson* v. *Siebenmann*, 605 F.2d 1058 (8th Cir. 1979) (state judge violated probation officer's rights by discharging her for writing a letter alleging misappropriation of funds by coworkers. Disruption in office caused by letter "would not have greatly increased" disharmony in the office.). *Cf. Abbott* v. *Thetford*, 534 F.2d 1101 (5th Cir. 1976), (*en banc*) *cert. denied*, 430 U.S. 954 (1977) (confidential relationship between judge and probation officer disrupted by the latter's conduct); *Tygrett* v. *Washington*, 543 F.2d 840 (D.C. Cir. 1974), *appeal after remand, sub. nom., Tygrett* v. *Barry*, 627 F.2d 1279 (D.C. Cir. 1980) (public officer could not be discharged for advocating

As noted above, there were two separate allegations concerning protected conduct by Dr. Hildebrand. The first concerned Dr. Hildebrand's criticisms of the curriculum. The second concerned Dr. Hildebrand's election to the DAC. However, we need not decide whether the First Amendment protected Dr. Hildebrand's actions. For purposes of this appeal, we shall assume, without deciding, that Dr. Hildebrand's conduct was protected.

We agree with the district court that evidence clearly showed that Dr. Hildebrand would have been denied tenure regardless of his First Amendment protected activities.

The tenure process at Michigan State involves many steps. There was no reason for the Dean of the University College, the Provost, or the Board of Trustees to deny tenure or recommend the denial of tenure because of Dr. Hildebrand's activities. The jury apparently agreed, because it ruled in favor of all defendants except Dr. Dunham, the department chairman, and Dr. Snyder, his assistant. Dr. Dunham based his decision on a recommendation received from the department's tenured faculty members.

In July of 1968 he convened all of the *tenured* faculty members who were available to seek their advice as to whether Dr. Hildebrand should be accorded tenure.[10] They voted unanimously that he should not receive tenure.

When Dr. Hildebrand returned from summer vacation, he asked for and received an opportunity to address the tenured faculty to try to convince them to change their recommendation. After hearing his reasons, the tenured faculty again voted unanimously to recommend against his being granted tenure. The tenured faculty's vote was based on their percep-

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a "sick-in" or "blue flu" even though police strikes are illegal). *See also Saye* v. *Williams*, —— U.S. ——, 49 U.S.L.W. 3910 (June 8, 1981) (Rehnquist, J., dissenting from denial of certiorari to *Williams* v. *Board of Regents*, 629 F.2d 993 (5th Cir. 1980).

[10] No tenured factulty member was sued, nor were any allegations made that they acted impermissibly in making their unanimous recommendation.

tion that Dr. Hildebrand did not fit into a multi-disciplinary department, but was better suited for a single disciplinary department such as Economics or Latin American Studies. The plaintiff produced no evidence to show impermissible motive on the part of any faculty member, other than Dr. Snyder. It is true that Dr. Dunham, as department chairman, recommended that Dr. Hildebrand not be granted tenure. However, he acted pursuant to the tenured faculty's recommendation. That recommendation was advisory in nature.[11] The tenured faculty based their recommendation on constitutionally permissible reasons. As a consequence, under these circumstances Dr. Dunham's recommendation that Hildebrand not be granted tenure cannot be challenged. Therefore, even if we assume that Dr. Hildebrand's conduct was protected by the First Amendment, we hold that his tenure denial was not based upon his exercise of that protected conduct.

We think that the district court acted properly in granting J.N.O.V. Accordingly, we affirm its judgment and direct that the injunction temporarily reinstating the plaintiff be dissolved. Each party shall bear its own costs.

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[11] We realize that as a practical matter the department chairman frequently follows the tenured faculty's recommendations concerning tenure. There may be instances in which impermissible factors motivate an advisory body's recommendation. In such instances, the designation of "advisory" would not necessarily insulate the official decision if it can be shown that the commttee's conduct was a factor motivating the official decision.

Opinion of the United States District Court
for the Western District of Michigan
(Filed September 9, 1980)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

JOHN R. HILDEBRAND,
Plaintiff,

vs. G 285-71 CA 5

BOARD OF TRUSTEES OF MICHIGAN
STATE UNIVERSITY; et al.,
Defendants.

OPINION
(Filed September 9, 1980)

The following memorandum opinion constitutes the second effort by the writer to set forth the issues and resolutions of issues in a case of a teacher seeking tenure. The writer's first opinion was filed on March 13, 1977. The writer was reversed by action of a panel of the Sixth Circuit on August 16, 1979 (amended September 17, 1979), two and one-half (2½) years later. The majority opinion of the panel concluded with the order:

> "The only fair solution to this tangled and protracted case is to reverse and remand for a prompt *jury trial on all issues* . . ." (emphasis supplied).

607 F.2d 713.

From the deluge of litigation on the subject, this Court had understood the law to be as stated in the terse statement of Judge Weick to be the consensus approach:

"The legal claim is for compensatory and punitive damages charging a conspiracy and violations of the rights of the plaintiff, an untenured teacher . . . The equitable claim is for reinstatement with back pay . . .

Under federal law, the legal claim must be tried first before a jury and the equitable claim resolved subsequently. . . ."

607 F.2d at 713.

Regrettably, this Court had no alternative than to submit the case "on all issues" including, of course that of "due process" which should have been dismissed but for the order from above and the order to admit at trial the playing of tapes and other extraneous matters taking place long after the matter had been heard and decided at the university level. Such trial took place in December 1979 to January 1980 leading to total confusion by a frustrated jury which finally compromised itself and went home.[1] Quite obviously "trial on all issues" to a jury as directed by the majority of the appellate court was not and could not be fair to defendants.

The factual setting was properly set forth in the writer's first (March 13, 1977) opinion. It will be supplemented but briefly herein.[2]

This civil rights action was filed in the Western District of Michigan on October 12, 1971 by a former nontenured associate professor at Michigan State University. The plaintiff had commenced his term of employment at the university in September, 1967, having been appointed for a term of two years. If plaintiff had been reappointed (1969) tenure would have been automatically granted, under well defined university guidelines.

Reappointment was ultimately denied by the Board of Trustees in their refusal to rehire. Such "nonaction" came as a result of the unanimous recommendation of the full tenured

professors (of plaintiff's department) on July 2, 1968 followed by a subsequent meeting of the full, tenured professors on September 23, 1968 with plaintiff, in which the full professors, after a confrontation with plaintiff again recommended a denial of reappointment (and tenure); followed by the recommendation of the department chairman that plaintiff not be reappointed; followed by the recommendation of the Dean of the University College that plaintiff not be reappointed; followed by the recommendation of the Provost that plaintiff not be reappointed.

The record, both in testimony and exhibits is replete with references to the step by step process of hearings upon hearings being held while the university was being advised by able counsel in the pre-Roth-Sindermann decisions of the United States Supreme Court on June 29, 1972.

The record shows quite clearly that plaintiff was not "sleeping on his rights" as he considered them to be. He was writing to the new President of the University. (See pages 501 *et seq* of testimony of first trial, Clifton Wharton). A hearing was held before the Employment Relations Commission, Labor Relations Division, on October 14, 1969 (filed by Stipulation as part of the records and files of this case on January 18, 1972). As recited by the signatory to the majority opinion, plaintiff:

> ". . . commenced a series of intra-University appeals, but to no avail. He then filed two unsuccessful unfair labor practice charges with the Michigan Employment Relations Commission. The Michigan State Courts denied leave to appeal and the plaintiff turned to the federal court."

607 F.2d at 706.

Plaintiff was granted leave to amend his complaint on February 22, 1974 by Chief Judge Noel P. Fox, three months before the writer took office in May, 1974. Although deluged with cases assigned by the Chief Judge (no blind draw in the West-

ern District of Michigan in 1974; and ultimately in 1979 the writer was drowning in over 1200 *civil* cases), the writer set a pretrial conference for July 16, 1974 and trial for October 1974.

Obviously, the gratuitous remarks in the opinion of the majority that:

> "Over two years later, on March 18, 1977, the Court issued an extensive opinion . . . ."

607 F.2d at 707, emphasize the power of an appellate court to humiliate a trial judge.[3]

At the time when the writter was begging for assistance from the Sixth Circuit Council, as the Chief Judge of the Western District was dumping patent cases, anti-trust cases, and, an emergency $650,000,000 nuclear power plant case, then closed down (K-74-323 Consumers Power Co. v. Combustion, et al), involving conflicts of 26,000 interrogatories, and 93 days of hearings in 1975-76, in addition to an ever mounting load, and having been inundated with an extremely complicated fraud case by the Chief Judge of the district in July 1975[4], this Court has the benefit of the "ambiguous" help from the appellate judges in the Fourth Circuit in three separate and contrasting opinions on some of the issues in this case. (*Burt* v. *Board of Trustees*, 521 F.2d 1201 (1975)). The *Burt* panel could unanimmously agree on *one* issue: ". . . to vacate the judgment below." 521 F.2d at 1203.

> "On remand, the district court will comply with the directions contained in Judge Cravens' opinion, which has the support of Judge Winter, except with respect to the measure of damages."
>
> As to damages, with respect to subsequent proceedings at law, the district court will follow Judge Winter's opinion which has the support of Judge Russell. With respect to further proceedings in equity, the district court will follow

judge Cravens' opinion, which has the support of Judge Russell."

521 F.2d at 1203.

With such help, the writer can understand why it took two and one-half years for the Sixth Circuit to release its divided opinion (607 F.2d 705) even though the writer should be publicly excoriated under such circumstances for its delay "over two years later . . . ."[5]

Following the orders of the Sixth Circuit, after being in continuous session in the trial of jury cases in the summer and fall of 1979, the case was tried before a jury "*on all issues.*"

Following extended deliberations,[6] the jury found that Dr. Douglas Dunham, Chairman of the Department of Social Science, and his Administrative Assistant, Dr. Clinton A. Snyder, had acted to prevent plaintiff's reappointment in retaliation for conduct protected by the first amendment. The claim of due process violations was rejected by the jury.[7]

In view of the manner in which the trial judge was ordered to retry (a new experience) the case, this Court could only interpret the majority opinion as one that will eventually order reinstatement of the plaintiff. In order to save time and effort and further delay, this Court ordered Dr. Hildebrand's reinstatement to the faculty. This has, of course, led to numerous problems of the kind and variety that have caused some federal judges of late to wonder if they should really continue to try to run state colleges and universities from a long distance.

Presently before the Court is defendants' motion for judgment n.o.v., or, in the alternative, for a new trial. For the reasons stated herein, the Court grants defendants' motion for judgment n.o.v., and pursuant to Fed.R.Civ.P. 50(c) conditionally grants a new trial of the plaintiff's First Amendment claims.

Opinion of the United States District Court for the Western District of Michigan (Filed September 9, 1980)

I.

Before proceeding to a discussion of the basis for the Court's ruling, a brief summary of background facts is appropriate. The plaintiff, as noted above, commenced his term of employment at MSU in September of 1967. At that time the Department of Social Science, in which the plaintiff taught,[8] followed the practice of using a common final examination for all sections of a particular class. This approach was unsatisfactory to the plaintiff and he voiced dissatisfaction to colleagues within the department. During the last half of his first year, the plaintiff successfully sought election to the department advisory committee (DAC). Both of these actions—his criticism of conditions within the department, and his election to the DAC—are alleged to have resulted in the decision to deny reappointment to the plaintiff.

On July 2, 1968, Dr. Dunham held a meeting with several of the full professors in the department to discuss the question of plaintiff's reappointment. Following that meeting the full professors voted unanimously not to recommend him for reappointment, and in September of 1968 Dr. Dunham informed the plaintiff that he would not be reappointed. Following unsuccessful attempts to reverse that decision through internal University procedures, the plaintiff filed two charges before the Michigan Employment Relations Commission. This route, too, was without success, and the plaintiff thereafter commenced the present action.

II.

At the outset it is useful to consider the legal principles that guide our consideration of this matter. The standard for ruling on a motion for judgment n.o.v. is, of course, the same as that applied in determining whether a directed verdict should be granted. *Dulin* v. *Circle F. Industries, Inc.*, 558 F.2d 456 (8th Cir. 1977).

Opinion of the United States District Court
for the Western District of Michigan
(Filed September 9, 1980)

The issue raised by a motion for a judgment n. o. v. is whether there is sufficient evidence to raise a question of fact for the jury. *O'Neill* v. *Kiledgian*, 511 F.2d 511, 513 (6th Cir. 1975). This determination is one of law to be made by the trial court in the first instance. *Id.* In determining whether the evidence is sufficient, the trial court may neither weigh the evidence, pass on the credibility of witnesses nor substitute its judgment for that of the jury. Rather, the evidence must be viewed in the light most favorable to the party against whom the motion is made, drawing from that evidence all reasonable inferences in his favor. See *Gillham* v. *Admiral Corp.*, 523 F.2d 102, 109 (6th Cir. 1975), *cert. denied*, 424 U.S. 913, 96 S.Ct. 1113, 47 L.Ed.2d 318 (1976). If, after thus viewing the evidence, the trial court is of the opinion that it points so strongly in favor of the movant that reasonable minds could not come to a different conclusion, then the motion should be granted. *Id.* at 109; *Reeves* v. *Power Tools, Inc.*, 474 F.2d 375, 380 (6th Cir. 1973); 9 Wright & Miller, Federal Practice and Procedure § 2524 (1971). An appellate court when reviewing the trial court's decision is bound by the same standard. *Gillham* v. *Admiral Corp., supra*, 523 F.2d at 109; *O'Neill* v. *Kiledgian, supra*, 511 F.2d at 513.

Morlock v. *NCR Corp.*, 586 F.2d 1096, 1104 (6th Cir. 1978).

There was no direct evidence presented during this trial to establish the defendants' liability, and therefore the proper role of inferences is of some importance. The party against whom a motion for judgment n.o.v. is directed is entitled to all *reasonable* inferences from the evidence, *Morlock, supra*. The difficulty, of course, is in distinguishing between a reasonable and therefore legitimate inference, and one which is unreasonable and therefore not legitimate. This issue was addressed in

Carlson v. *American Safety Equipment Corp.*, 528 F.2d 384 (1st Cir. 1976):

> Plaintiff claims that although there is no direct evidence . . . she is entitled to a positive inference . . . since the evidence must be viewed in the light more favorable to her. However, this claim must fail. There are two views as to what standard should govern such inferences. Under one view a plaintiff's entitlement to inferences drawn in his favor on a motion for a directed verdict only extends to inferences where the evidence already offered makes the existence of the fact to be inferred more probable than its nonexistence. 9 C. Wright & A. Miller, Federal Practice and Procedure § 2528 (1971). Under the other view, where two conflicting inferences are equally probable, a plaintiff is entitled to have the question submitted to the jury. Wratch v. S.J. Groves & Sons, Co., 405 F.2d 1061, 1067 (4th Cir. 1969). In the present case, however, . . . we do not find the inference to meet either standard. A plaintiff is not entitled to unreasonable inferences which rest on speculation and conjecture.

528 F.2d at 386. Accord, *Bridges* v. *Groendyke Transport, Inc.*, 553 F.2d 877 (5th Cir. 1977) (an inference would be unreasonable if it would allow the jury to rest its verdict on mere speculation and conjecture). As the discussion which follows makes evident, under either standard for the use of inferences the plaintiff has failed to raise an issue for the jury.

Mt. Healthy City School District v. *Doyle*, 429 U.S. 274 (1977), provides the law applicable to this case. There, Justice Rehnquist writing for a unanimous Court, announced a two part inquiry:

> The difficulty with the rule enunciated by the District Court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire,

and does indeed play a part in that decision—even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

* * * * *

Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor"—or, to put it in other words, that it was a "motivating factor"[2] in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.

429 U.S. at 285-286, 287. In Parts IIA and II B, infra, we consider whether the plaintiff and the defendants have met their respective burdens under *Mt. Healthy*.

A.

As reported by answers to written interrogatories, the jury concluded from the evidence that the plaintiff was subject to

retaliation both because he criticized conditions within his department, and because he was elected to the DAC. Although alleged in the complaint, the jury rejected plaintiff's candidacy for the DAC as an act or event leading to the non-renewal of his appointment.

We examine first the conclusion that plaintiff was not renewed because he criticized conditions within the department. The plaintiff testified that he expressed disagreement with the then current practice of using common final examinations and textbooks for certain classes. The plaintiff, however, also testified that these practices had been questioned before his appointment.[9] Significantly, there was no evidence which suggested that defendants disagreed with the changes advocated by the plaintiff. The plaintiff has simply shown two facts—first, that he voiced the criticisms noted above, and second that his appointment was not later renewed. However, any basis for inferring a causal connection between the two is lacking. His argument is no more than *post hoc, ergo propter hoc*, and there is no basis for concluding that plaintiff suffered retaliation for criticizing conditions within his department. It would be reasonable to conclude that in order to create a "first amendment" claim the plaintiff contrived his "criticism" to shield a less than satisfactory performance as a teacher.

Also unsupported by the record is the conclusion that plaintiff was not reappointed because he was elected to the DAC in March of 1968. That committee customarily advised the chairman of the department in several areas, including personnel decisions. As a result of the March, 1968 election, however, four out of five members on the committee lacked tenure. At its June meeting, the department chairman, Dr. Dunham, announced that in view of the committee's composition he deemed it advisable to consult with full professors in the department when tenure decisions came up for consideration. And in recommending that the plaintiff not be reappointed, Dr. Dunham did seek the advice of full professors and acted upon their unanimous view.[10]

The plaintiff nevertheless atrributes momentous probative weight to Dr. Dunham's "failure" to consult with the DAC before making this decision. Dr. Dunham, however, testified that he did not do so because of the composition of that committee. As noted above, four of its five members did not have tenure, and the plaintiff was himself a member thereof. Under the circumstances it was entirely reasonable and proper for Dr. Dunham to seek alternate avenues in obtaining advice on the tenure decision.[11]

Provost John Cantlon who headed ninety-one departments at Michigan State University and a defendant in this case was asked:

> "Q If Dean Carlin had reported to you a recommendation on Hildebrand that had originated with the advisory committee, and you were told that four out of five members comprising the committee were non-tentured would you have accepted the recommendations?
>
> A No, sir."

(Tr. 474, 1st trial.)

This Court considers itself compelled to accept this logical and sensible approach and further considers the conduct of Dr. Dunham not only blameless but responsible. Tenure is effectively a lifetime contract with the University and one can hardly be faulted for seeking the advice of the most experienced and knowledgeable members of the faculty. The writer considers the argument of plaintiff to be shockingly illogical. After actively participating in "stacking" the DAC with non-tenured assistant professors he sought to pervert the system by insisting that the DAC pass upon the all important tenure issue. This audacious move was cleverly and successfully exploited by plaintiff's counsel with each witness in the case: i.e. that the usual and familiar process of consultation was changed in this case. Thus, plaintiff and his fellow non-tenured

colleagues assert their right to be "litigants" for tenure in a "court" where they could act as plaintiffs, judges, and jury. The constant rerun of the "due process" issue ordered by the majority of the Court of Appeals in commanding "a prompt jury trial on all issues" (607 F.2d at 713) produced the ultimate verdict in this case. Moreover, it is undisputed that in January of 1968—before the plaintiff's election to the DAC—the full professors requested that Dr. Dunham involve them in personnel decisions. Thus, an inference of retaliation from Dr. Dunham's "failure" to consult with the DAC could only be improperly based on speculation and conjecture.

Similarly, plaintiff would infer retaliation from the fact that Dr. Dunham met with the full professors in July of 1968 to discuss his reappointment, after which they unanimously voted to recommend that his contract not be renewed. The plaintiff faults the timing of this meeting because University procedures state that information for the tenure decision is to be gathered in the fall term and because the meeting was held at a time when the plaintiff was not on campus.

Dr. Dunham testified that he scheduled the meeting in July because a majority of the full professors would then be available, and the Court is unable to perceive any way in which the plaintiff was placed in a less advantageous position by this timing. During that summer the plaintiff was on his farm in western Kansas. The evidence presented in no way suggested that anything happened, or that defendants thought that anything would happen between July and early in the fall term to alter the recommendation of the full professors. Thus defendants had no reason to believe that the outcome of the meeting would be different if held during the fall term. Indeed, the evidence established just the opposite. At the plaintiff's request and as a special concession to plaintiff, the full professors met again on September 23, 1968 to discuss his reappointment and unanimously affirmed their prior decision. At the second meeting of the full professors on the subject not only was the

plaintiff on campus but he was allowed to present his case to the professors personally. Similarly, the plaintiff's absence from East Lansing lacks significance because he had no role to play in that meeting. To argue from these events that one should infer retaliation for protected conduct is nothing short of frivolous. Nevertheless, the carefully orchestrated proofs of plaintiff make this a dramatic issue under the appellate court order to try the case "on all issues."

The plaintiff would also infer the motivation necessary to support his claim from the failure of defendants to provide written reasons for the action taken. In early November of 1968 the plaintiff directed a letter to Dr. Dunham which requested that he be given written reasons for the action taken. Dr. Dunham replied by letter and informed the plaintiff that although they had already discussed the matter, he would be "quite willing" to do so again, but he did not provide the reasons in writing as requested. However, the uncontroverted testimony of Dr. Cantlon established that University policy at that time was to withhold written reasons from a person whose reappointment was not renewed. The policy was explained by Dr. Cantlon (Provost) in detail. In the pre-Roth-Sindermann era this was done with non-tenured personnel for their own benefit so that there would be nothing adverse in the file or records of the university which might make employment elsewhere more difficult. The plaintiff has thus proven nothing more than that Dr. Dunham's actions conformed to the policy of the University. To infer a retaliatory motive from such proof would be without a basis in reason, and at best constitute speculation and conjecture.

The plaintiff also relies on two statements which defendant Snyder is said to have made. The first was during the June, 1968 meeting of the DAC, shortly after the plaintiff's election. Based upon the testimony of several witnesses the jury could have found that Dr. Snyder referred to the outcome of the election by the nontenured professors to the DAC as "rotten or stink-

ing fish." From this the plaintiff would infer that defendants did not renew his appointment because he was elected to that body. However, viewed in the context in which it was made and in the light of Dr. Snyder's expressed concerns, the Court does not believe that his characterization of the outcome will support such an inference.

Dr. Snyder testified of his view that some of the junior faculty members might have conspired to ensure the election of certain candidates. No testimony was presented that Dr. Snyder did not, in fact, honestly and sincerely hold this view. The DAC had traditionally been composed principally of tenured faculty, and, as the plaintiff and several witnesses testified, had theretofore advised Dr. Dunham in making personnel decisions. Thus, with respect to a significant part of its function, the DAC was debilitated by the election of a majority of members without tenure since such decisions are customarily made by faculty with tenure. It is therefore not surprising that Dr. Snyder would use such restrained language in reference to the election. Under these circumstances the only inference reasonably arising from the above statement is that Dr. Snyder opposed the renewal of plaintiff's appointment because he was believed to be a part of a scheme to manipulate the election.

This, however, would not constitute a violation of the plaintiff's rights under the First Amendment. The University obviously has a greater interest in regulating the First Amendment activities of its faculty than does the state in regulating the activities of its citizens in general. The interest of the University in the ordered and proper administration of its affairs must be weighted against the plaintiff's interest in making his views known. *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968). While it protects more than public expression, *Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410 (1979), this Court concludes that the First Amendment clearly would not protect one who sought to express his views through

arranging the outcome of a DAC election where the effect thereof is to render that committee unfit for a significant portion of its ordinary function.

The jury could also have found that in November of 1968 Dr. Snyder told the plaintiff that "none of you young squirts" elected to the departmental advisory committee will ever get tenure. This statement, according to the plaintiff's testimony, was part of Snyder's response when asked how he could vote for the plaintiff in the March DAC election and then vote to deny his reappointment in July of the same year. Snyder stated that the first vote had come before he knew that the plaintiff "didn't fit in," and the comment on tenure followed as part of the same conversation. The inference which arises from this evidence is the same inference that could arise from Snyder's characterization of the election's outcome. The same incident was under discussion, and it is therefore difficult to view this comment as anything more than an expression of his view that persons who ought to improperly manipulate the DAC should not be granted tenure.

Thus, both of Snyder's statements at best lend support only to the inference that he favored non-renewal of the plaintiff's appointment because of conduct unprotected by the First Amendment. His statements do not reasonably support the theory that plaintiff was subject to retaliation merely because he and four other non-tenured faculty members happened to be elected, or because he merely sought to express his views through election to the DAC.

Other evidence introduced by the plaintiff included a letter from Dr. Dunham to Vincent Lombardi, dated October 15, 1968. At that time Dr. Lombardi was also an untenured member of the advisory committee. The letter refers to and discusses a previous conversation between the parties. According to the testimony of Dr. Lombardi that meeting concerned his interpretation of the decision to deny plaintiff's reappointment. The plaintiff argues that this letter shows or demonstrates an

intent to retaliate improperly against him. This is to be inferred, in particular, from a statement in the letter which Dr. Lombardi apparently found threatening: "Furthermore, you share with them a certain amount of uncertainty about your position since none of you has tenure." Taken in context, however, this statement is no more than a factual assertion supporting Dr. Dunham's premise that Dr. Lombardi, although having several years of affiliation with the department, had a unique relationship with the younger and newer members of the faculty. The letter also refers to Dr. Lombardi's age-group affinity with these members of the department. After considering the quoted language in context, as well as the rest of the letter, this Court is simply unable to ascertain how the necessary inference could arise from this evidence. Dr. Lombardi was one of the members of the "rump" non-tenured DAC that was urging that it be allowed to judge the qualifications for tenure for one another.

A substantial amount of attention during the trial was devoted to the question of whether the plaintiff had a joint appointment in the Latin American Studies Center which, at that time, was under the direction of Dr. Garland Wood. The argument apparently is that Dr. Dunham's "tainted" motivation is demonstrated because he did not seek Dr. Wood's recommendation. The testimony of Dr. Cantlon, however, made clear that when a person has a joint appointment his salary is paid in part by each of the departments, and both departments then provide input for the tenure decision. On the other hand, a faculty member with an appointment in one department and "title affiliation" in another has his salary fully paid from the department to which he was appointed, and the chairman of that department need not consult with the "title affiliation" department in making a tenure recommendation.

Provost Cantlon also testified that the Latin American Studies Center did not offer joint appointments, but that faculty members with an interest in this field were given title

affiliation therewith, to promote the activities of the Center and to facilitate research in an area of common interest. It is undisputed that plaintiff's entire salary was funded by the department of Social Science. He had *no* classes in the Latin American Studies Center.

Plaintiff's counsel attempted to show that Dr. Hildebrand would have believed that he had a joint appointment from the documents received by him. The argument presented was that Dr. Dunham should have consluted with Dr. Wood, and from his failure to do this one should infer a tainted motive. The patent fallacy in this argument, however, is that the plaintiff's motive is not in question, but rather the motive of Dr. Dunham. And he would have legitimately believed that Dr. Hildebrand had title affiliation only with the Latin American Studies Center.

As stated above, the Latin American Studies did not offer joint faculty appointments, and Dr. Dunham's department had full salary responsiblity. Moreover, the appointment recommendation (defendants' Ex. K) for Dr. Hildebrand, dated March 24, 1967, clearly states that he had a *title affiliation* only. There is no doubt, then, that Dr. Dunham would have believed he was under no obligation to consult with Dr. Wood. Furthermore, in view of the unanimous recommendation of the full professors in his department, it is not at all surprising or unusual that he did not seek additional advice from Dr. Wood. As with all of the evidence reviewed by this Court, the necessary inference simply does not arise from the facts presented. Furthermore, the evidence shows *no* attempt by Dr. Wood was made to have Dr. Hildebrand evaluated and recommended for tenure in the Latin American Center Program.

A consideration of other evidence introduced by the plaintiff is not warranted, except to note that the Court has completely and fully reviewed such evidence in the light most favorable to him, giving him the benefit of all reasonable inferences. Under *Mt. Healthy City School District* v. *Doyle*, *supra*,

the plaintiff has the burden of showing that conduct protected by the First Amendment was a substantial or motivating factor in the decision to deny his reappointment. Considering the evidence in its entirety, the Court must conclude that he has not met this burden. Dr. Hildebrand's complaint is nothing more substantial than that the chairman of his department consulted with a group which did not recommend him for tenure, whereas, if the chairman had consulted the DAC, he would have been recommended for tenure because his friends constituted a majority of that committee.

As the evidence so clearly demonstrates, Dr. Dunham had legitimate reasons for consulting with the full professors. It is possible that their judgment was erroneous and that the judgment of the DAC would have been correct. Its members, however, were not in a position to make the decision, and federal courts should not sit to review the wisdom of personnel decisions made at state universities. Cf. *Faro* v. *New York University*, 502 F.2d 1229 (2d Cir. 1974). This is particularly true in view of the testimony of Provost Cantlon that he would not have accepted a recommendation from a Department Advisory Committee heavily weighted with non-tenured assistant professors.

B

There is a separate and independently sufficient reason for compelling this Court to grant defendants' motion for judgment n.o.v. *Mt. Healthy City School District* v. *Doyle*, *supra*, clearly provides that defendants have no liability if the plaintiff would not have been reappointed even in the absence of his protected conduct. Accordingly, even if we assume that such conduct played a substantial role in the defendants' determinations, the Court's inquiry would not be complete.

The evidence establishes that on July 2, 1968, Dr. Dunham conferred with several of the department's full professors to discuss plaintiff's reappointment. A vote was taken at that

meeting, and the full professors *unanimously* recommended that the plaintiff's contract not be renewed.

The plaintiff maintains, and so testified, that Dr. Dunham failed to provide all relevant information for the full professors, suggesting that if he had done so the outcome would have been different. Assuming that plaintiff was correct, any deficiency in this respect was remedied in September of 1968 when the full professors met with the plaintiff, at his request, so that he could explain to them why their July recommendation was in error. When another vote was taken following this meeting the same recommendation was unanimously adopted.

Under any existing procedure this clearly expressed view of the full professors could not, as a practical matter, be ignored by the department chairman. Dr. Cantlon (the Provost) testified that even if the department chairman had gone to the DAC its recommendation would not have been accepted as a legitimate sounding of the faculty because of that committee's composition at the time. This Court, therefore, is led inescapably to the conclusion that regardless of any alleged tainted considerations motivating Drs. Dunham and Snyder, the plaintiff's appointment to the faculty would not have been renewed.

Hickman v. *Valley Local School District*, 619 F.2d 606 (6th Cir. 1980) does not suggest a different result. There the district court, after a non-jury trial granted judgment for defendants. It found that the plaintiff had proven a prima facie case of dismissal predicated upon constitutionally protected union activities. The district court further concluded, however, that the plaintiff would have been terminated even in the absence of her union activities because of a personality conflict with the principal of the school at which she taught. Therefore, judgment was entered for defendants. The Court of Appeals reversed, reasoning that the "personality conflict" was inextricably linked to her protected conduct: "[W]e conclude that the 'personality

conflict' is a consequence of Hickman's protected conduct and cannot serve to rebut her prima facie case." 619 F.2d at 609.

In marked contrast, the apparent reasons for the recommendation of the full professors were neither inextricably linked to his position on the DAC or his criticism of department practices. The Court does not understand plaintiff to have alleged that the full professors in his department were impermissibly motiviated in recommending that he not be reappointed, and in any event the evidence did not establish such an allegation. Rather, the testimony presented indicates that the other professors voted against Dr. Hildebrand because they were critical of his teaching and contribution to the department.[12] Clearly the attempt by plaintiff to reduce the controversy of Dunham and Snyder versus Hildebrand must fail.

Accordingly, the Court concludes from the evidence presented at this trial that under the principles announced in *Mt. Healthy, supra,* the defendants are without liability and judgment should be entered accordingly.

III.

Rule 50 of the Federal Rules of Civil Procedure requires that whenever a motion for judgment n.o.v. is granted the Court must also make a conditional ruling on any motion for a new trial. It has long been settled that the standards applied in resolving these two motions are different:

> Where there is substantial evidence in support of plaintiff's case, the judge may not direct a verdict against him, even though he may not believe his evidence or may think that the weight of the evidence is on the other side; for, under the constitutional guaranty of trial by jury, it is for the jury to weigh the evidence and pass upon its credibility. He may, however, set aside a verdict supported by substantial evidence where in his opinion it is contrary to the clear

> weight of the evidence, or is based upon evidence which is false; for, even though the evidence be sufficient to preclude the direction of a verdict, it is still his duty to exercise his power over the proceedings before him to prevent a miscarriage of justice. See Felton v. Spiro (C. C. A. 6th) 78 F. 576. Verdict can be directed only where there is no substantial evidence to support recovery by the party against whom it is directed or where the evidence is all against him or so overwhelmingly so as to leave no room to doubt what the fact is. Gunning v. Cooley, 281 U. S. 90, 50 S. Ct. 231, 74 L. Ed. 720. Verdict may be set aside and new trial granted, when the verdict is contrary to the clear weight of the evidence, or whenever in the exercise of a sound discretion the trial judge thinks this action necessary to prevent a miscarriage of justice. For a learned and exhaustive discussion of this subject, see the opinion of Judge Lurton in Mt. Adams & E. P. Inclined Ry. Co. v. Lowery (C. C. A. 6th) 74 F. 463.

Garrison v. *United States*, 62 F.2d 41, 42 (4th Cir. 1932); *Accord, O'Donnel* v. *Geneva Metal Wheel Co.*, 183 F.2d 733 (6th Cir. 1950); *National Car Rental System, Inc.* v. *Better Monkey Grip Co.*, 511 F.2d 724 (5th Cir. 1975).

Under the foregoing standard, a jury verdict can be set aside and a new trial granted even though the verdict is supported by substantial evidence, and in making its determination the trial court is also permitted to weigh the evidence. In view of the Court's ruling that there was insufficient evidence presented to raise an issue for the jury, it is obvious that the Court would set aside the verdict because it was against the clear weight of evidence. Without again going through a detailed consideration of the evidence, the Court concludes that defendants effectively rebutted plaintiff's claim, either by testimony that certain events did not happen or by presenting a reasonable and compelling motivation for taking actions which the plaintiff found to be tainted.

The majority of appellate court's command to submit all issues to the jury has caused other and greater problems. This was considered by the signatory of the majority opinion as "the only fair solution." Thus, the jury was required to report on the generally accepted equity claims of reinstatement with back pay imposing upon them added and difficult burdens with which they were in no way capable of coping. For the benefit of the appellate court (majority) the writer heard another protracted and difficult tenure case (*Stern* v. *Shouldice*, M-43-73) subsequent to receiving the opinion of the court in the first trial of this case (607 F.2d 705). Unusually able counsel on both sides specifically requested and stipulated that the writer (trial judge) should reject a "jury trial on all issues" (see p. 713) as it would be confusing to the jury. Accordingly, the writer considered the order in *Hildebrand* to apply in that case only and thus save *Stern* v. *Souldice* from "a procedural nightmare worthy of inclusion in a first year of law school civil procedure examination authored by the most cunning of professors." (607 F.2d at 712.)

Of course, the jury in this case has not considered whether, after twelve years, Dr. Hildebrand is capable of teaching. They did not consider whether, even if wronged, he could be or would be accepted into a department which unanimously considered him unworthy of tenure. They did not consider what Dr. Hildebrand should be reinstated to: assistant professor, full professor, head of the department, Dean of the University College or Provost? For a well reasoned opinion on this subject see *Mayberry* v. *Dees, et al*, Civil No. 805; U.S. District Court for the E.D. North Carolina, Washington Div. January 4, 1979.[13]

Further, the matter of damages was not fully explored. In the trial of *Stern* v. *Souldice* (M-43-73) the testimony of plaintiff Stern was that after being denied tenure he took a civil service examination with the Michigan Department of Education, was accepted at a higher salary than either Stern (at Lake Superior

State) or Hildebrand (at Michigan State University) received. Dr. Stern was a *drama* professor. His current complaints are two: (1) that his drama background is not what prepared him for his job with the Michigan Department of Education; and (2) that he must leave his home in Sault Ste. Marie and move to Lansing. Dr. Hildebrand is a University of Chicago graduate in Economics which would have, had he been interested, far better qualified him for the Michigan Department of Education position, and he resides in Lansing.

Thus, in *Stern* v. *Shouldice*, the able attorneys for both plaintiff and defendant could not believe that the claims of reinstatement and damages correctly designated as "equitable" by Judge Weick should be submitted to the jury and they were not.

There is, of course, another patent inconsistency in the jury's verdict in this case.

A review of the testimony of Provost Cantlon and Dean of the University College in the first trial reveals that their acceptance of the recommendation of the tenured faculty opposing the granting of tenure to plaintiff was advisedly made with full knowledge of all preceding events and it was their recommendations which led to the ultimate decision. Both Dr. Carlin and Dr. Cantlon approved of Dr. Dunham's recommendations after being fully informed. Nevertheless, they are in no way held to have violated first amendment rights. The writer does not believe they should be, as their recommendations to the president of the university were sound and based upon reason just as was that of Dr. Dunham. Had Dr. Cantlon and Dr. Carlin merely "rubber stamped" the recommendations from below, their failure to investigate might have been subject to criticism.[14] But it was their informed action as much as Dr. Dunham's that resulted in a denial of tenure.

In view of this Court's analysis of the evidence with respect to the motion for judgment n.o.v., it follows a fortiori that

under the standard for granting a new trial that this verdict is against the clear weight of evidence[15] and must be set aside.

IV

In accordance with the views set forth herein, the defendant's motion for judgment non obstante veredicto should be and hereby is granted. Pursuant to Fed.R.Civ.P. 50(c), the defendant's motion for a new trial is conditionally granted. The judgment for plaintiff previously entered is hereby vacated, and the clerk shall enter judgment for defendants.

V.

The assumption that federal courts can operate colleges and universities located long distances away in a manner superior to those operating such institutions is fallacious. As stated by Robert H. Bork at the Pound Conference:

> "Your topic today concerns the types of disputes best assigned to courts and the types better assigned to another forum . . .Yet candor, if not in this company, prudence, requires me to remark in passing that some of the judiciary's problems in this respect are self-inflicted."

(The Pound Conferences—Perspectives on justice in the future. "Dealing with the Overload in Article III Courts" p. 150, West Publishing Co. 1979).

In summary, the plaintiff consumed several days in exploiting every nuance allowed by the majority of the Court of Appeals for trial "on all issues." The position of the plaintiff was grounded upon two fallacious premises: (1) that in reality he was denied his due process rights by Dr. Dunham and Dr. Snyder in not having consideration of tenure submitted to his friends and newly elected nontenured faculty cohorts then constituting a majority of the Department Advisory Commit-

tee; and (2) that because he was not provided with a "fair" hearing of kind or manner he wanted, his unsuccessful quest for tenure was a first amendment violation.

The plaintiff's first amendment claim was as tenable as his due process claim but no better. Plaintiff was, in truth, denied tenure by the full professors after a hearing at which he appeared; by an informed Dean of the University College; the Provost; and the University President.

(s) WENDELL A. MILES,
Chief District Judge

Dated: September 9, 1980

NOTES

[1] The writer has always made a practice of discussing jury case deliberations with those willing to do so subsequent to trial. Never in my 35 years of observation was there a more hardened deadlock created largely by the days upon days of testimony of "all issues" unrelated to proper presentation of evidence in the case. One juror reprimanded the writer for sending a first amendment claim to "a jury of 8th grade graduates which none of us understood."

The rerun of the "due process" part of plaintiff's case, which, in effect was his case produced most of the confusion. Particularly irrelevant and confusing was the running of a tape before the Board of Trustees much later and accompanied by the testimony of a former member of the board as to what it meant. This was done, of course, at the command of the majority of the panel. (See 607 F.2d, 713, n.15).

It would have seemed to the writer that the opinion of the jury in the first trial of the case might have had some effect. Note on page 711 of 607 F.2d 705 in the margins the answers to interrogatory (2)(b)(c) and interrogatory number 4.

[2] The writer of this opinion has been immersed and surrounded by pedagogists throughout his life. Both his father and mother were school teachers, his sister was a school teacher, his only two daughters are school teachers and members of the MEA; one of whom has been an officer of and bargainer for school teachers of her MEA district for the last two years and the writer has taught classes on the college level for five years and has been invited and will be back on faculty (college level) in 1980-81 school year. The writer has been a member of a public school board for eleven years serving as its president and involved in teacher negotiations without incident or difficulty throughout that period.

[3] It would be foolhardy, of course, for a mere trial judge to joust with an appellate court judge armed with the power of nationwide publication of opinions and the media to carry on the ridicule.

[4] See G-228-73 Hawes v. C.E. Cook (Findings of Fact pursuant to ORDER of Sixth Circuit Court of Appeals, pp. 1 & 19 attached hereto).

Pages 1 and 19 (footnotes) of this court's "Findings of Fact Pursuant to ORDER of the Sixth Circuit Court of Appeals dated April 15, 1975" in Hawes v. C.E. Cook & Co., No. G-228-73 are included herein for two reasons:

(1) Not only was the writer handed about every heavily weighted case by chief judge Fox in the 1974-75 year but;

(2) The Sixth Circuit Court of Appeals was well aware of what was happening to the writer (208 days on the bench although 110 days was considered a normal and equitable number of days to so spend). Various members of the circuit bench have indicated their awareness of the problem

although the signatory to the majority opinion in 607 F.2d 713 (at 707: "Over two years later") appears to be totally unaware of the problem (viz. that the chief judge assigning cases was spending his summers on the beach and the writer was expected to put in 200 days on the bench).

In the year 1979, the writer's court was in almost continuous session. When the case was published by the Sixth Circuit Court of Appeals in 607 F.2d 713 there were 2,258 civil cases pending in the Western District of Michigan, 1,230 of which were assigned to the writer. The average civil case load per judge in 1979 was less than 350. Likewise, the criminal docket was jammed and far behind.

[5] The contribution by Mr. Chief Justice Burger to Sindermann and Roth in his concurring opinion in 408 U.S. 603 could never have greater application than in this case:

> "That point is that the relationship between a state institution and one of its teachers is essentially a matter of state concern and state law."

Had the federal courts permitted this case to have been addressed to the state court in Michigan it could have been adjudicated in six months. The writer was inundated with over a thousand civil cases while Congress chose to await a change of administration before sufficient additional judges could be supplied. Above and beyond that this is the type of case that should be heard on a local level.

[6] The jury started deliberating on January 3, 1980, and returned a verdict late in the date on January 5, 1980. The verdict was a "compromise" verdict as the alternative to failing to reach a result.

[7] In the opinion of the majority in *Hildebrand* v. *Bd. of Trustees*, 607 F.2d 705, it is acknowledged that:

> "These interrogatories, set forth in the margin, indicate that the jury concluded that no due process violation took place."

Thus, two juries have now so found. Nevertheless, the order of the court of appeals in footnote 15 (607 F.2d at 713) to place before the jury extraneous matters and "remand for a prompt jury trial on all issues" caused hopeless confusion on a rerun of "due process."

[8] The plaintiff also had a connection with the Latin American Studies Center at M.S.U. There was dispute during the trial as to whether he had a joint appointment or a title affiliation with that center. The significance of this distinction, and its impact upon the case is discussed at p. 15 infra.

[9] In fact some of the same criticisms had been raised in *Improving Undergraduate Education: The Report of the Committee on Undergraduate Education* (Michigan State University, 1967) (defendants' exhibit M). The plaintiff testified that he was not an author of that report, and that it was underway before he arrived.

[10] Dr. John E. Cantlon, defendant and Provost of the full university, supports the policy. As he expressed it in the first trial: ". . . . . I would not expect a single department of the 91 would make a decision without the predominant advisory structure." (Tr. 474).

[11] Defendant Edward A. Carlin, Dean of the University College testified to this effect in both trials. See Transcript in first trial at 293: "I said I was concerned about the Composition of the Department Advisory Committee and I was."

[12] This is illustrated by the following colloquy from the deposition of Professor David Klien, which was admitted in evidence:

"Q Do you remember being convened by the Department Chairman, Douglas Dunham, for purposes of voting your conviction on whether John Hildebrand should be appointed and granted tenure?

A Yes, yes.

Q You do remember that?

A Oh, yes.

Q And you were a full professor at that time?

A Surely, otherwise I wouldn't have been at the meeting.

Q Okay, How did you vote on the matter of granting a renewal of appointment to Hildebrand and conferring tenure on him?

A Negative.

Q Why?

A Well, there were a number of reasons. I didn't think in general that he met the criteria for appointment to full professor. This involved both his teaching and his scholarship.

Q All right. Now do you want to explain to us what went into your judgment so far as both his teaching and his scholarship were concerned?

A I was particularly badly impressed by a colloquim that Dr. Hildebrand gave to the Department as a whole. I felt that the colloquim failed to gauge the level of sophistication of the audience; that substantively there was very little in it, that it was essentially a kind of narrative-journalistic account that had very little conceptual framework to it.

Q Who was the audience that this was presented to?

A The members of the Department.

Q And you are speaking of the teaching faculty?

A Oh, yes, yes.

Q So that wasn't one given to students?

A Oh, no, no. This was our colloquim. Although they were technically open to students, students virtually never came. The full Department was not there either. This was simply a group of people who were interested in coming and listening.

Q And you being one of those persons went and listened?

A Uh-huh.

Q And came off poorly impressed?

A Yes.

Q What about teaching?

A The thing that concerns me about the teaching was this: That we have a fairly specialized kind of course which is an integrated course; and when people come in from specific disciplines, be it political science or economics or psychology, social psychology or sociology, no matter how well-equipped they are in their discipline, there are a great many things that they need to learn about the way the course goes, about the nature of the student body, because these are non-majors and because they come themselves from a wide variety of disciplines with relatively little interest in the social sciences to begin with.

Anyone who comes in needs to spend a good deal of his time conferring and consulting with other members of the faculty in terms of how to deal with certain problems, how to teach, what some of the techniques and styles and so on that work and so forth.

When I came to the Department, I spent almost half of my time the first year talking to other people, a variety of them, some of them within my discipline, some of them outside, trying to get a feeling for how the course went. At that time we were all teaching the same course and consequently we had common interests and common concerns, and Hildebrand simply never showed up. We had no communication on this level in any way.

Q Did that indictate to you a concern for his teaching development or a lack of it?

A Well, certainly a lack of it.

[13] In *Mayberry* v. *Dees, et al.*, Civil No. 805; U.S. District Court for the Eastern District of North Carolina, Wash. Division (January 4, 1979), the trial judge ably addressed the issue of reinstatement as follows:

> Another significant point is the passage of more than five years between the time plaintiff was denied tenure and his jury verdict. It is crucial that public university professors achieve and maintain high competence levels for scholarship and instruction. During the period in question, plaintiff did not teach or publish articles in his areas of expertise but merely read and researched "towards" the publication of various papers and a book to be co-authored with his wife. By reinstating Dr. Mayberry, and thus presenting him with teaching assignments, the court would be concluding that he is competent to bear such a load without an objective, realistic appraisal of his professional and instructional skills at the present time. Cf. Hostrop v. Board of Junior College District No. 515, 523 F.2d 569, 578-79 (7th Cir. 1975).

[14] Dr. Clifton Wharton testified in the first case that he had received a letter from plaintiff (p. 502), and that he had.

"A Well, I immediately contacted Provost Cantlon to ascertain what the nature of the litigation was and the nature of the problem. Provost Cantlon indicated to me the brief sequence, which I think has been reviewed here in the Court, namely that he had not been reappointed, that he had in fact been—appeared before the department Tenure Committee, that he had filed with the All-University Tenure Committee an appeal of the due process and the All-University Committee said due process had not been violated, and there was current litigation pending, and that therefore I should contact you because of his filing with the Michigan Employment Relations Commission. I contacted you, but I did not respond to the letter.

Q All right. As the principal officer of Michigan State University and the one responsible for its day-to-day operation, did you find any impropriety in the method that Hildebrand's denial of reappointment was handled?

A Not so far as I could tell in terms of the review. Obviously it was not something that occurred when I was there. The vote on his non-reappointment had taken place when Dr. Hannah was president, and I was not there, and he had severed connections with the university at the time of his various appeals, at the time when Dr. Adams was acting president of the University. It would appear to me at the time it did, that in view of the findings of the All-University Tenure Committee, that there had been, as far as the university bodies were concerned, no determination of any lack of due process, but since it was under litigation and on the advice of counsel, I did not respond to the letter further at that point.

[15] The jury's verdict was attributable to its consideration of the case in an unnecessarily confused and complex state. The signatory of the majority (of two) of the Court of Appeals "suggested" that any motion for a directed verdict be held in abeyance until after the jury completed its deliberations. Obviously, the trial court yielded to what it considered an *order*. Although this Court clearly should have been allowed to grant a directed verdict on the question of due process, it did not do so and this claim was submitted to the jury.

As a result evidence relevant only to the due process claim was before the jury. Such evidence included a tape recording of a meeting of the University Board of Trustees held on April 16, 1971, long after the events leading to the decision in question. Since the jury requested a transcript of the recording after they started to deliberate it is apparent that they deemed it important. (The jury did not receive a copy of the transcript but it was read to them in the courtroom). From this tape the jury heard that certain members of the Board believed that it was unfair to withhold from professors whose appointments are not renewed the reason for that decision. This would, of necessity, have had an improper impact on the jury's consideration of the First Amendment claims. This was clearly not the type of case for a trial judge to dump all issues on the jury.

Opinion of the United States District Court
for the Western District of Michigan
(Filed September 9, 1980)

The arguments which plaintiff was permitted to make in connection with his due process claims had great impact on the jury and steered it (or some of them) to a conlcusion that was against the weight of evidence. This is particularly true with respect to the question of qualified immunity, *Wood* v. *Strickland*, 420 U.S. 308 (1974), and the award of punitive damages. Since application of the First Amendment to privately expressed views by a governmental employee was not settled until *Givhan* v. *Western Consolidated School District*, 439 U.S. 419 (1979), it can hardly be said that plaintiff's rights in this regard were well settled at the time of defendants' actions. Thus the finding of malice that led the jury to impose punitive damages may also have caused them to strip defendants of immunity from personal liability. Yet there is scarely anything in the record to support this conclusion, and the constant references to procedural unfairness and to defendants' refusal to provide written reasons played a significant part in that determination.

Finally, having been directed to submit "all issues" to the jury, this Court permitted the jury to pass on the issue of back pay and reinstatement. This procedure was contrary to the Court's understanding of the law (see opinion of Judge Weick concurring in the result, *Hildebrand*, *supra*, 607 F.2d at 713) and needlessly complicated the jury's task in a conceptually difficult case.

Furthermore, the direction to submit the case on "all issues" was contrary to plaintiff's jury demand in this case. Plaintiff, in filing his "Demand for Jury Trial" parenthetically included the statement: "(some issues)" and in the demand, stated:

> ". . . plaintiff demands trial by jury of the liability for the amount of money damages."

See copy of plaintiff's jury demand attached hereto.

Opinion of the United States District Court
for the Western District of Michigan
(Filed September 9, 1980)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

ROBERT J. HAWES, ET AL,
Plaintiff,
vs.
C. E. COOK & CO.,
Defendant.

NO. G-228-73

FINDINGS OF FACT PURSUANT TO ORDER OF THE SIXTH CIRCUIT COURT OF APPEALS DATED APRIL 15, 1975
No. 74-1685

I.
INTRODUCTION

On April 16, 1975, the United States District Court for the Western District of Michigan received an order from the Sixth Circuit Court of Appeals in the above case instructing that:

> "The same is hereby remanded to the Distrcit Court for specific findings of fact upon appellees' contention that a certain tenancy by the entirety between defendant Cook and his wife, dated June 30, 1971, was created with the intent to defraud plaintiffs and other creditors of defendants, and for a finding (or findings) of fact pertaining to whether or not irreparable harm would befall plaintiffs absent of the contested writ. . . . . These proceedings and entry of said findings should be completed and forwarded to this court within two weeks of the issuance of this order.[1]

This order was subsequently modified on April 24, 1975. The words "within two weeks of issuance of this order" was stricken and the phrase "at the earliest possible convenience of the District Court" was substituted in its place.

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[1] When the order was issued by the panel of the Court of Appeals, Chief Judge Fox was in Florida. His law clerk apparently contacted him and the judge apparently ordered his law clerk to dump the files of the case on the writer's desk. Chief Judge Fox has never mentioned the case to the writer since.

Opinion of the United States District Court
for the Western District of Michigan
(Filed September 9, 1980)

In July, 1974 this case was reassigned by and from Chief Judge Fox to this Court. This reassignment came about as a result of the Chief Judge's decision to rid himself from further activity in the case.[2] The given reason was based upon the fact that suit had been filed against him by defendant C.E. Cook in the U.S. District Court for the

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[2] The writer assumed office on May 9, 1974. About one month before that time Judge Fox caused a local rule to be passed (by him) endowing himself with full power to assign all cases. The result was that innumerable complex cases were assigned, hundred of old cases were dumped onto the writer necessitating a first year (July 1, 1974-June 30, 1975) record of 208 days on the bench (including a week on the 6th Circuit bench).

[3] There have been many days and evenings devoted to an attempt to comprehand the subjective thinking and work product of another judge.

Opinion of the United States District Court
for the Western District of Michigan
(Filed September 9, 1980)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHN R. HILDEBRAND,
Plaintiff,
vs.
BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, CLIFTON R. WHARTON, President of Michigan State University, JOHN EDWARD CANTLON, Provost, Michigan State University, EDWARD A. CARLIN, Dean of University College, Michigan State University, DOUGLAS DUNHAM, and CLINTON A. SNYDER,
Defendants.

Civil File No. G285-71

DEMAND FOR JURY TRIAL
(Some Issues)

TO: Clerk of the Court

and Anderson, Carr & Street
700 Davenport Building
Lansing, Michigan 48933

PLEASE TAKE NOTICE that plaintiff demands trial by jury of the liability for and the amount of money damages in the above entitled cause.

MACLEAN, SEAMAN, LAINE & GUILFORD
Attorneys for Plaintiff
By: (s) Kenneth Laing, Jr.
Business address:
1504 Michigan National Tower
Lansing, Michigan 48933

Dated: November 8, 1971

JUDGMENT ON DECISION BY THE COURT
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF MICHIGAN

JOHN R. HILDEBRAND

VS. CIVIL ACTION FILE NO. G285-71

BOARD OF TRUSTEES OF MICHIGAN
STATE UNIVERSITY, ET AL

JUDGMENT
(Filed September 11, 1980)

This action came on for trial before the Court, Honorable Wendel A. Miles Chief, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that judgment for plaintiff previously entered is hereby vacated, and judgment is rendered in favor of defendants.

Dated at Grand Rapids, Michigan, this 11th day of September, 1980.

(s) GERALD H. LIEFER
Clerk of Court

By: (s)
Deputy Clerk

No. 80-1618
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN R. HILDEBRAND,
Plaintiff-Appellant,

v.

BOARD OF TRUSTEES OF MICHIGAN
STATE UNIVERSITY, ET AL.,
Defendants-Appellees.

ORDER DENYING PETITION FOR REHEARING
(Filed December 1, 1981)

Before: WEICK and KEITH, Circuit Judges, and HORTON,* District Judge.

A majority of the judges of the Court having not favored rehearing en banc, the petition for rehearing has been referred to the above panel for disposition.

Upon consideration, the Court concludes that the petition for rehearing is without merit. Accordingly, it is ORDERED that rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT
(s) JOHN P. HEHMAN
Clerk

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* Hon. Odell Horton, United States District Judge for the Western District of Tennessee, sitting by designation.

Opinion filed August 16, 1979

No. 77-1435

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOHN R. HILDEBRAND,

Plaintiff-Appellant,

v.

BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, CLIFTON R. WHARTON, President, Michigan State University; JOHN EDWARD CANTLON, Provost, Michigan State University; EDWARD A. CARLIN, Dean of University College, Michigan State University; Douglas Dunham, and Clinton A. Synder,

Defendants-Appellees.

APPEAL from the United States District Court for the Western District of Michigan.

Decided and Filed August 16, 1979.

Before: WEICK and KEITH, Circuit Judges, and CECIL, Senior Circuit Judge.

KEITH, Circuit Judge, delivered the opinion of the Court, in which CECIL, Senior Circuit Judge, joined. WEICK, Circuit Judge, (p. 17) filed a separate concurring opinion.

KEITH, Circuit Judge. In recent years, the genteel academic world has been rocked with controversies which have required adjudication by federal judges. This case presents an increasingly common dispute – a non-tenured professor whose em-

ployment is terminated, claims that his first amendment and due process rights were abridged. The issues presented in this appeal, however, do not directly implicate the merits of how and why the plaintiff was fired. Instead, plaintiff complains of certain evidentiary rulings and of the district court's denial of his right to trial by jury. We find merit in his contentions and reverse and remand for a new trial.

FACTS

Background

For a number of years prior to 1967, the plaintiff, Dr. John R. Hildebrand, was a full professor at Texas Technological University. He applied for a position on the faculty of Michigan State University and was accepted in April of 1967. Hildebrand began teaching courses in the Department of Social Science[1] at Michigan State in September of 1967.

At the time, Michigan State's social science program followed a standard format to which all professors were expected to conform. The plaintiff became dissatisfied with this mechanical approach since it left no room for variation by individual instructors. He voiced these and other concerns to his colleagues, some of those criticisms were contained in a report entitled *Improving Undergraduate Education*. He also successfully sought election to a position on the Departmental Advisory Committee. In early June of 1968, shortly after his successful election, the plaintiff met with Douglas Dunham, Chairman of the Department of Social Sciences. The two discussed Dr. Hildebrand's future in what appeared to be a frank and cordial fashion.

Approximately one month later, during the summer recess, Dr. Dunham met with a number of the department's full professors. They discussed Dr. Hildebrand's upcoming re-

[1] He also had a joint appointment as an associate professor in the Latin American Studies Center.

appointment and voted unanimously not to recommend him for reappointment. On September 12, 1968, Dr. Dunham informed the plaintiff by letter that he would not be reappointed. By this time, the plaintiff had returned from the summer recess. Dr. Hildebrand commenced a series of intra-University appeals, but to no avail. He then filed two unsuccessful unfair labor practice charges with the Michigan Employment Relations Commission. The Michigan State courts denied leave to appeal and the plaintiff turned to federal court. Dr. Hildebrand's employment with Michigan State terminated on August 31, 1969.

Federal Proceedings

Suit was filed on October 12, 1971, against the defendants — The Board of Trustees of Michigan State and various University employees. Plaintiff alleged that his termination was in retaliation for the exercise of his first amendment rights and that the University procedures which were followed contravened the due process clause of the 14th Amendment. The cause of action was based on 42 U.S.C. §§ 1983 and 1985. Plaintiff prayed for reinstatement, back pay and compensatory and punitive damages.

Both plaintiff and defendant made timely requests for a jury trial. The jury trial issue was not raised at all throughout pre-trial proceedings, including a motion to dismiss, motion for a preliminary injunction and motion for summary judgment. At the final pre-trial conference on August 16, 1974, everyone assumed that the case would be tried by a jury and the pre-trial statement so indicated. The case went to trial before a jury for approximately five days. Both sides presented their evidence; neither side moved for a directed verdict at any point. After both sides rested but before the jury was instructed, the district court, on its own motion, questioned whether a jury was appropriate.

After considering the issue, the court concluded that the case sounded in equity and that the case would not be submitted for a jury verdict after all. Instead, the court decided that it would treat the jury as advisory under F.R.Civ.Pro. 39(c) and have it answer certain interrogatories to help out with the final decision. And so it happened: The jury answered four interrogatories; both sides submitted proposed findings of fact and conclusions of law; and the case was submitted to the district court for decision. Over two years later, on March 18, 1977, the court issued an extensive opinion finding in favor of the defendants on all counts and dismissing the complaint. The plaintiff appeals.

I

The plaintiff contends that the district judge erred in taking the case over from the jury and deciding it himself. We agree. The Seventh Amendment guarantees that a trial by jury be had in all federal cases presenting "legal" claims over $20.00. Before 1938, this presented little problem since cases at law were separate from cases in equity. In 1938, everything changed; law and equity were merged. The merger of law and equity is universally acknowledged to be a good thing, but it has created problems in the jury trial area since one is entitled to a jury trial on legal claims, but not equitable ones. Some clarity was brought to this area by *Dairy Queen* v. *Wood*, 369 U.S. 469 (1962), and *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959), which command that where a case presents both legal and equitable issues, jury trial rights must be preserved.

The question remains, what is a "legal" issue? Guidance is provided by *Ross* v. *Bernhard*, 396 U.S. 531, 538 n.10 (1970), where the Court stated:

> As our cases indicate, the "legal" nature of an issue is determined by considering, first, the pre-merger custom

with reference to such questions; second, the remedy sought; and third, the practical abilities and limitations of juries.

The first part of the test created confusion. Some courts took the view that no jury trial right attached to purely statutory causes of action which had no direct common-law counterpart. *See McCraw* v. *United Ass'n of Journeymen*, 341 F.2d 703, 709 (6th Cir. 1965); *Lawton* v. *Nightingale*, 345 F. Supp. 683 (N.D. Ohio 1972); *Buss* v. *Douglas*, 59 F.R.D. 334 (D. Neb. 1973). Whatever merit there might have been to this expansive notion, it was quickly deflated by *Curtis* v. *Loether*, 415 U.S. 189 (1974). There, the Court ruled that a jury trial was available in a housing discrimination suit under Title VIII of the Civil Rights Act where the plaintiff sought actual and punitive damages. *Curtis* v. *Loether* shifts the focus to the second issue: the nature of the relief sought.

A key dividing line between law and equity has historically been that the former deals with money damages and the latter with injunctive relief. This distinction has been blurred by court decisions indicating that not all money damages claims will be deemed "legal." *See Curtis* v. *Loether*, *supra* at 196; *Mc Ferren* v. *County Board of Ed. of Fayette Co., Tenn.*, 455 F.2d 199, 202-04 (6th Cir. 1972); *Local No. 92, Int'l Ass'n of Bridge, S. & O. Workers* v. *Norris*, 383 F.2d 735, 740-42 (5th Cir. 1967). *See also Georgia Power Co.* v. *138.30 Acres of Land*, 596 F.2d 644 (5th Cir. 1979). A common example is an employment discrimination claim brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* which seeks injunctive relief (i.e. reinstatement) and back pay. Although the Supreme Court has never directly adressed this question,[2] the courts of appeals have

[2] The Court has continued to leave the issue open. *See Lorillard* v. *Pons*, 434 U.S. 575, 583-84 (1978); *Curtis* v. *Loether*, 415 U.S. 189, 196-97 (1974).

uniformly held that no jury trial right exists. *See Slack* v. *Havens*, 522 F.2d 1091, 1094 (9th Cir. 1975); *EEOC* v. *Detroit Edison Co.*, 515 F.2d 301, 308 (6th Cir. 1975), *vacated and remanded on other grounds*, 431 U.S. 951 (1977); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 802 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971); *King* v. *Laborers Int. Union*, 443 F.2d 273, 279 (6th Cir. 1971) (dicta); *Johnson* v. *Georgia Highway Express, Inc.*, 417 F. 2d 1122, 1125 (5th Cir. 1969).

The rationale for this view is that a back pay award is a discretionary, "make whole" remedy which is incidental to injunctive relief. *See Lorillard* v. *Pons*, 434 U.S. 575, 582 (1978); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 441-444, (Rehnquist, J., concurring); *Slack* v. *Havens, supra* at 1094; *EEOC* v. *Detroit Edison Co., supra* at 308; *Johnson* v. *Georgia Highway Express, Inc., supra* at 1125. In contrast a claim for actual and/or punitive damages is viewed as purely "legal." *See Curtis* v. *Loether, supra* at 195-96; *EEOC* v. *Detroit Edison, supra at* 308-11. *See also United States* v. *Snepp*, 595 F.2d 926, 935-38 (4th Cir. 1979), *petition for cert. filed* June 18, 1979, 47 U.S.L.W. 3826.

The third issue to be examined is whether a case is too complex for the jury to understand. No Supreme Court opinion has ever found such a case, although there is increasing lower court authority concerning it.[3] This factor is inapplicable here in any event since the district court specifically stated that this case was not beyond the capability of a jury.

The above-cited authorities mandate that the chief focus to be made when determining whether a jury trial right exists is the nature of the relief sought. If the remedy sought is injunctive relief and/or back pay, no jury trial right attaches. In the ordinary case, if the relief sought includes compensatory and/or punitive damages, then there does exist a right

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[3] *See Hyde Properties* v. *McCoy*, 507 F.2d 301, 306 (6th Cir. 1974) (accounting); *ILC Peripherals* v. *IBM*, 458 F.Supp. 423, 444-49 (N.D. Cal. 1978) (anti-trust case). *See generally*, Note, *The Right to a Jury Trial in Complex Civil Litigation*, 92 Harv. L. Rev. 898 (1979).

to trial by jury. *See National Union Electric Corp.* v. *Wilson*, 434 F.2d 986 (6th Cir. 1970).[4]

II

In this case, the plaintiff sought actual and punitive damages in addition to reinstatement and backpay. There is direct authority that such claims entitle one to a jury trial in a first-amendment retaliatory discharge case. *Burt* v. *Board of Trustees of Edgefield City School District*, 521 F.2d 1201 (4th Cir. 1975); *Amburgery* v. *Cassady*, 507 F.2d 728 (6th Cir. 1974). Subsequent suits similar to this one have been tried to a jury. *See Cooper* v. *Johnson*, 590 F.2d 559 (4th Cir. 1979) (J.N.O.V. entered) (2-1 decision); *Goss* v. *San Jacinto Junior College*, 588 F.2d 96 (5th Cir. 1979); *Wagle* v. *Murray*, 546 F.2d 1329 (9th Cir. 1976), *vacated and remanded*, 431 U.S. 935 (1977), *on remand*, 560 F.2d 401 (9th Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978); *Norbeck* v. *Davenport Community School District*, 545 F.2d 63 (8th Cir. 1976); *Bertot* v. *School District No. 1*, 522 F.2d 1171 (10th Cir. 1975) (J.N.O.V. entered on appeal). These authorities mandate a jury trial in cases such as this.

A.

At the time it removed the case from the jury, the district court did not have the benefit of *Burt, supra*, or our decision in *Amburgery, supra*. In its subsequent opinion the district court attempted to distinguish these decisions. We are unable to do so.

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[4] We need not rule here about the continued vitality of our decision in *McGraw* v. *United Ass'n of Journeymen & App. of Plumbing*, 341 F.2d 705, 709-10 (6th Cir. 1965). *See Int'l Bhd. of Boilermakers* v. *Braswell*, 388 F.2d 193 (5th Cir.), *cert. denied*, 391 U.S. 935 (1968); *Simmons* v. *Avisco, Local 713, Textile Workers Union*, 350 F.2d 1012 (4th Cir. 1965); *Paley* v. *Greenberg*, 318 F. Supp. 1366 (S.D.N.Y. 1970).

The court stated that in order to be entitled to a jury trial, a party must sustain its burden of coming forward with the evidence as to the legal issues in the case. The court went on to analyze the plaintiff's claim for compensatory damages for mental anguish and for punitive damages and found them insubstantial. The court pointed to *Lynch* v. *Pan American World Airways*, 475 F.2d 764, 765 (5th Cir. 1973), where the Fifth Circuit stated that "unsupported allegations for compensatory and punitive damages" under 42 U.S.C. § 1981 could not "unilaterally alter the genre" of an essentially equitable employment discrimination proceeding.

We will assume that the district court correctly determined that the damages counts were insubstanial.[5] Plaintiff urges that this makes no difference and that *Lynch* cannot survive *Curtis* v. *Loether*. We disagree. A plaintiff already has considerable power to determine whether there will be a jury trial since he can decide whether to add actual or punitive damages counts to his complaint. This right should not extend to a case where the actual or punitive damages counts are frivolous or clearly not meritorious The question then becomes, at what point must this determination be made?

There is surprisingly little authority on when a jury trial determination need be made. The Supreme Court expressly left the question open in *Curtis* v. *Loether*, *supra*, 415 U.S. at 196 n.11. Judge Stevens' opinion in *Rogers* v. *Loether*, 467 F.2d 1110, 1118-19 (7th Cir. 1972), *aff'd sub nom*, *Curtis* v. *Loether*, 415 U.S. 189 (1974) stated that a jury demand should be decided on the allegations and relief sought in the plaintiff's complaint. *See also Canister* v. *Leahy*, 182 F.2d 510, 513 (3rd

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[5] Defendants argue that actual and punitive damages as well as backpay were unavailable because of sovereign immunity. *Edelman* v. *Jordan*, 415 U.S. 651 (1974). *See Sheham* v. *Bd. of Trustees of Bloomsburg State Coll.*, 590 F.2d 470, 485-94 (3d Cir. 1978); *Goss* v. *San Jacinto Jr. College*, 588 F.2d 96, 98-99 (5th Cir. 1978); *Soni* v. *Bd. of Trustees of Univ. of Tenn.*, 513 F.2d 347, 351-53 (6th Cir. 1975). It is unnecessary for us to address this issue now.

Cir. 1950), *cert. denied*, 342 U.S. 893 (1951); *Ring* v. *Spina*, 166 F.2d 546, 549 (2d Cir.) *cert. denied*, 335 U.S. 813 (1948).

We think that this view is too strict. Under the liberal pleading allowances of the Federal Rules of Civil Procedure, allegations made in pleadings must be broadly construed. A complaint cannot be dismissed unless a plaintiff could advance no set of facts which would entitle him to relief. *See Conley* v. *Gibson*, 335 U.S. 41, 45-46 (1957). When examining a complaint, one must look solely at the allegations made and assume that they are true. If a judge considers affidavits or other materials, a motion to dismiss a complaint is converted into a motion for summary judgment. F.R.Civ.Pro. 12(c). If a trial judge could look only at the pleadings, then too many meritless damages claims could be made on which to base jury demands.

We think that the pre-trial standard contained in F.R.Civ. Pro. 56 is preferable. If it becomes clear prior to trial that no genuine issue exists as to any material facts, a district court can grant summary judgment as to some or all issues. This standard can operate to eliminate meritless damages requests and thus moot a jury demand.[6] Under this standard, the district court is free to examine all of the record and not just the pleadings. If a demand for damages is so insubstantial that it cannot meet the standard contained in Rule 56, then it should not be allowed to convert equitable issues into legal ones.

Our view is in accord with that of several courts which have emphasized that only an overall look at the issues presented and claims made will determine whether they are essentially legal or essentially equitable. *See Kerr-Mc Gee*

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[6] We do not formalistically require that actual summary judgment be entered as to damages counts before trial so long as the district judge makes it clear to the parties that no jury trial will be had because the money damages claims were not meritorious when tested against F.R.Civ.Pro. 56 standards.

Corporation v. *Bokum Corporation*, 453 F.2d 1067, 1071-72 (10th Cir. 1972) (Court examined pleadings and attached exhibits to determine that no right to trial by jury existed); *Klein* v. *Shell Oil Co.*, 386 F.2d 659 (8th Cir. 1967) (Court examined underlying contract and held that the issue presented was equitable. The court concluded that "[t]he question at hand must be resolved not merely by the form of the complaint but by an appraisal of the basic nature of the claims or issues presented, and the type of relief sought") *Cf. King* v. *United Benefit Fire Ins. Co.*, 377 F.2d 728, 731 (10th Cir. 1967) (pre-trial conference an "opportune time" to consider a jury demand.) *See also Ross* v. *Bernhard*, *supra*, 396 U.S. at 538 ("The Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action."); *Dairy Queen Inc.* v. *Wood*, *supra*, 369 U.S. at 478 ("[T]he constitutional right to trial by jury cannot be made to depend upon the choice of works used in the pleadings"). *See generally* 9 C. Wright & A. Miller, Federal Practice & Procedure § 2304 (1971).

In this case, however, the district court let the case be tried before a jury and then withdrew it from them. His conclusion that the damages claims were frivolous was based on the testimony at trial. In effect, the district court held that if damages claims cannot survive a motion for directed verdict, then it is proper to abort a jury trial and convert the proceedings into a bench trial.

We think that considerations of fundamental fairness and judicial economy militate against this view. Any good trial lawyer will testify that there are significant tactical differences in presenting and arguing a case to a jury as opposed to a judge. To convert a trial from a jury trial to a bench trial (or vice-versa) in the middle of the proceedings is to interfere with counsel's presentation of their case and, quite possibly, to prejudice one side or the other. Further, it is a waste of the additional time and money which is inherent to a

jury trial. *Cf. Simko* v. *C&C Marine Maintenance Co.*, 594 F. 2d 960, 965-66 (3d Cir. 1979). *But see Mahramas* v. *American Export Isbrandtsen Lines, Inc.*, 475 F.2d 165, 172-73 (2d Cir. 1973).

B.

Even if we were to adopt the district court's view, we would have to reverse. In this case *both* sides requested a jury trial. Neither side ever moved to strike the jury demands. Indeed, neither side ever moved for a directed verdict. Since both parties apparently wanted the jury to decide this case and since the jury had heard both sides' presentation, the district judge's conduct in *sua sponte* taking the case away from the jury is particularly difficult to understand.

Even if the court was correct that no jury trial right existed in this case, F.R.Civ.Pro. Rule 39(c)[7] permits both sides to stipulate to a jury trial. To be sure, a district court does not have to go along with the stipulation, but once that occurs, it does not have unbridled discretion to change its mind. In *AMF Tuboscope, Inc.* v. *Cunningham*, 352 F.2d 150 (10th Cir. 1965), the district court approved a jury trial stipulation, but on the eve of trial, vacated the stipulation on its own motion on the ground that the parties had no right to a jury. The Court of Appeals found an abuse of discretion. Assuming that the district court in this case had the authority to abort the jury's decisionmaking role, we would find an abuse of discretion in the exercise of that authority.

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[7] F.R.Civ.Pro. 39(c) provides:

> "In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, *the court with the consent of both parties may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.*" (emphasis added)

III

One final issue requires examination — the effect of the use of the jury in an advisory role. We do not have a situation here where the entire case was submitted to the jury for an advisory verdict. Despite counsel's requests that the whole case be submitted, the district court submitted only four interrogatories for the jury to answer. These interrogatories, set forth in the margin,[8] indicate that the jury concluded that

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[8] Interrogatory No. 1

Should plaintiff, John R. Hildebrand be reinstated to the staff at Michigan State University.

(Yes — No) Yes

Signed /s/ Dennis A. Merizon

Interrogatory No. 2

The Social Science, University College, Departmental By-Laws, and appendix thereto (November 3, 1967) provides in pertinent part as follows (page 12):

"IV. Staff Evaluation

The staff evaluation practices currently in operation are as follows:

. . . . . .

(2) *At the time of reappointment*
(a) Department chairmen confers with advisory committee and/or tenured staff.

(b) The Dean and each non-tenured faculty member will confer at least once every two years. Department chairman will confer with non-tenured faculty at least once a year regarding the faculty members professional standing and prospects.

(c) Recommends to the Dean.
Was there compliance with the above stated procedures with reference to plaintiff, John R. Hildebrand?

(Yes — No) Yes

Signed /s/ Dennis A. Merizon
Foreperson

Interrogatory No. 3

Was plaintiff John R. Hildebrand entitled to reappointment at the conclusion of his two year probationary appointment?

(Yes — No) Yes

Signed /s/ Dennis A. Merizon

Interrogatory No. 4

Did any of the defendants knowingly deprive plaintiff John R. Hildebrand of reappointment at Michigan State University

no due process violation took place, but that the plaintiff should have been reinstated to his position at Michigan State. Presumably, the basis for the jury's conclusion was that the plaintiff's firing was done in retaliation for the exercise of his first amendment rights. Plaintiff urges that we enter judgment on this verdict and remand solely for a determination of damages.

Defendants, on the other hand, suggested at oral argument that we treat the jury trial matter as harmless error and that we affirm the district court's findings of fact and conclusions of law. They point to dicta in the district court's opinion where it states that the proof was such that it would have granted a directed verdict in any event.[9]

This case presents a procedural nightmare worthy of inclusion in a first year of law school civil procedure examination authored by the most cunning of professors. The district court erroneously withdrew the case from the jury, but allowed it to answer certain interrogatories in an advisory capacity. The court then entered findings of fact and conclusions of law, but stated that a directed verdict would have been granted in any event.

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or knowingly deny him the type of hearing which he would otherwise be entitled to because of plaintiff's candidacy for Departmental Advisory Committee?

(Yes — No) No

Signed /s/ Dennis A. Merizon

Foreperson

If the answer to the question is "yes", then insert the name or names of the persons you have determined to have done so.

. . . . . .

. . . . . .

. . . . . .

[9] The district court stated, in relevant part:
". . . this Court's examination of the evidence leads to the rather inescapable conclusion that a directed verdict would have been justified here at the close of the evidence. . . . Considering the strong evidence already surveyed at some length, this [directed verdict standard] certainly appears to have been met. Indeed, a successful directed verdict at the close of plaintiff's case also seems a distinct possibility." App. at 235.

We do not think that we can enter judgment on the interrogatories. After deciding to take the case away from the jury, the district judge told both the jury and counsel that the jury's role would be solely advisory.[10] The entire case was not submitted to the jury for a general verdict. Nor can we ignore the district judge's statement that the evidence was such that a directed verdict would have been in order. At the very least it appears that the district court would have granted a Motion for New Trial had the case been in that procedural posture. In addition, the jury was not — could not have been — instructed in accord with the standards which the Supreme Court subsequently set forth in *Mt. Healthy School District* v. *Doyle*, 429 U.S. 274 (1977).

At the same time, we cannot sustain the district court's findings of fact and conclusions of law as a directed verdict. Neither side briefed or argued this issue in this court or in the court below and the district court's opinion was not written as a directed verdict. Neither side ever moved for a directed verdict and the district court never suggested prior to issuing its opinion that such a verdict was being considered. A motion for directed verdict is ordinarily a prerequisite to the filing of a motion for judgment notwithstanding the verdict.[11] In this case, both sides were apparently willing to let the jury decide the outcome since neither moved for a directed verdict, thus waiving their right to request J.N.O.V. Although some cases have indicated that a district judge has independent authority to direct a verdict,[12] the judge in this case never pur-

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[10] The issue of whether an advisory jury verdict could ever be treated as a "regular" jury verdict is unsettled. Dicta in *Parklane Hosiery Co., Inc.* v. *Shore*, 99 S.Ct. 645, 655 n. 24 (1979), indicates that it could not be. (". . . an advisory jury . . . would not in any event have been a Seventh Amendment jury.")

[11] *See Warner* v. *Kewanee Machinery and Conveyar Co.*, 411 F.2d 1060, 1063 (6th Cir.) *cert. denied*, 498 U.S. 906 (1969); *Southeastern Greyhound Lines* v. *McCofferty*, 169 F.2d 1, 3 (6th Cir.) *cert. denied*, 335 U.S. 861 (1948).

[12] *See Best* v. *District of Columbia*, 291 U.S. 411, 415 (1934); *Peter-*

ported to do so. Under these circumstances, we would have difficulty treating the district court's opinion as one granting a directed verdict.

Moreover, the district court, in finding against plaintiff's claim that he was denied tenure because he exercised his first amendment rights, relied heavily upon the fact that the plaintiff spoke in private to his co-workers and not in public.[13] The distinction which the district court drew between private and public speech cannot survive *Givhan* v. *Western Line Consolidated School District*, 99 S.Ct. 693 (1979).[14] Especially

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son v. *Peterson*, 400 F.2d 336 (8th Cir. 1968). *Cf. Moran* v. *Raymond Corp.*, 484 F.2d 1008, 1010 (7th Cir. 1973), *cert. denied*, 415 U.S. 932 (1974) (general motion for a directed verdict could be supplemented by counsel's argument).

[13] The district court stated in relevant part:

> Indeed, at least with respect to the statements alleged to have been the basis for nonrenewal [of tenure], the Court harbors doubts as to whether they are protected by the first amendment at all. In *Pickering* v. *Board of Education*, 391 U.S. 563, 88 S.Ct. 1731 (1968), the Supreme Court sought to strike a balance between a teacher's first amendment freedom of expression and a school district's legitimate interest in the efficiency of its endeavors. In the process, the Court, through its examination of the teachers' statements, attempted to "indicate some of the general lines along which an analysis of the controlling interests should run." 391 U.S. at 569, 88 S.Ct. at 1735. Although the record in this area is not fully developed, it appears that Dr. Hildebrand's statements differ from those in *Pickering* in a number of significant aspects.
>
> In *Pickering* the plaintiff took issue with the School Board's allocation of funds, stating his opinions in a letter to the editor of the local newspaper. Here, many of Dr. Hildebrand's statements disagreeing with the department's methods appear to have been made in private conversations with colleagues.
>
> In addition, the statements in *Pickering* were directed against the teacher's ultimate employer and did not involve persons with "the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning." 391 U.S. at 570, 88 S.Ct. at 1735. In this case, however, the content of plaintiff's expressions runs to a much greater extent towards his direct superiors and immediate colleagues, further attenuating the force of first amendment protections here.

[14] The district court, of course, did not have the benefit of the *Givhan* case at the time it wrote its opinion.

given this intervening clarification in the law, we cannot affirm the district court under directed verdict standards.

IV

The only fair solution to this tangled and protracted case is to reverse and remand for a prompt jury trial on all issues.[15] We are aware of the Western District of Michigan's glutted docket, but we see no other solution here. On these facts, especially with both sides requesting a jury trial, Dr. Hildebrand was entitled to have a jury decide the issues.

Reversed and remanded for a prompt trial by jury.[16]

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[15] Plaintiff also complains about two evidentiary rulings made by the district court. The court refused to admit a letter from defendant-professor Douglas Dunham to Dr. Vincent Lombardi, a supporter of the plaintiff. On remand, we think that the letter should be admitted at trial as relevant to the issues at hand under the liberal standard of F.R.E. 401.

The court also declined to admit a tape made of a meeting of the defendant Board of Trustees which contained reference to denial of due process. The tape contains random remarks by the Board members and does not reflect official action by the Board itself. On remand, the district court should consider admitting the tape subject to a limiting instruction. *See Arlington Heights* v. *Metropolitan Housing Corp.*, 429 U.S. 252, 268 (1977).

[16] Nothing in this opinion should be construed as precluding the entry of a directed verdict or J.N.O.V. as to some or all issues on retrial. Given the length of time that this case has been pending, however, we recommend that any motion for directed verdict be held in abeyance until after the jury renders its verdict. Similarly, we recommend that trial of this case be expedited, although we impose no time requirements.

WEICK, Circuit Judge, Concurring:

I concur in the result.

This case involves legal as well as equitable claims. The legal claim is for compensatory and punitive damages charging a conspiracy and violations of the constitutional rights of plaintiff, an untenured teacher at Michigan State University, arising out of the failure of the University to reappoint plaintiff at the expiration of his term of employment so that he could obtain tenure. The equitable claim is for reinstatement with back pay under 42 U.S.C. 1983.

Under federal law, the legal claim must be tried first before a jury and the equitable claim resolved subsequently in the light of the determination of the legal claim by the jury. *Dairy Queen* v. *Wood*, 369 U.S. 469 (1962); Wright's Federal Practice and Procedure § 2305; 5 Moore's Federal Practice and Procedure, para. 38.13 at p. 144. See also *Curtis* v. *Loether*, 415 U.S. 189 (1974).

Whether or not the issues in the legal claim are to be submitted to the jury for determination will necessarily depend on the sufficiency of the evidence which must be determined by the court applying the applicable rules if a motion is made for a directed verdict. I express no views on the sufficiency of the evidence as it is not properly before us. No motion for a directed verdict was made at the trial of this case and the court did not direct a verdict.

Opinion of the United States District Court
for the Western District of Michigan
(Filed March 18, 1977)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

JOHN R. HILDEBRAND,
Plaintiff,

vs. No. G 285-71 CA 5

BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, et al,
Defendant.

OPINION
(Filed March 18, 1977)

I. FACTUAL BACKGROUND

This is a civil rights case instituted by a former nontenured Associate Professor in the Department of Social Science in the University College of Michigan State University. Jurisdiction is predicated on the first and fourteenth Amendments, 42 U.S.C. §§ 1983 and 1985, 26 U.S.C. § 1331 and § 1343. Plaintiff in his Amended Complaint seeks reinstatement and back pay, along with compensatory and punitive damages. His primary allegations are that his nonrenewal was based upon the exercise of first amendment rights; that the procedure by which he was discharged violated his due process rights; and that his nonrenewal was at least in part the result of a conspiracy among some of the defendants.

After a period of teaching at Texas Technological University, plaintiff successfully applied for a position in the Social Sciences faculty at Michigan State. Dr. Hildebrand was officially notified of his acceptance on a form[1] from the Secretary of the University dated April 26, 1967 (See Appendix) which stated in part:

> "The Board of Trustees at its meeting April 20 approved your appointment as Associate Professor of Social Science

and the Latin American Studies Center at a salary of $12,500 per year on a 10-month basis effective September 1, 1967."

The remainder of the form was made up of the "Rules of Tenure at Michigan State University as Approved May 15, 1952." Section III thereof deals with Associate Professors, and states in pertinent part:

> "The initial appointment to the rank of associate professor for a person who has not served previously at Michigan State University shall be for a period of two years, except as specific provision to the contrary is made at the time of appointment. Upon reappointment he shall have tenure."[2]

Plaintiff commenced teaching at M.S.U. at the appointed date. His teaching responsibilities involved primarily Social Science courses numbered 231, 232 and 233. At this point, a consideration of the exact nature of Dr. Hildebrand's teaching duties is necessary. The social science program in the University College is apparently somewhat unique in its field.[3] The courses therein are intended to be interdisciplinary in nature, and "departmental" rather than "individual" in character. For any given instructor, this results in teaching from a standard format, rather than to his own tastes or along the lines of his particular specialization. The teaching efforts are intended as a team operation of the various disciplines represented, and a standard comprehensive examination culminates the course for all students, regardless of instructor. In that *milieu*, Professor Hildebrand started teaching in the 1967-68 school year.

During the school year, plaintiff apparently became dissatisfied with some of the conditions of the department, among them the interdisciplinary approach of the courses. He voiced these concerns and recommended changes to his colleagues, some of which were reflected in a report entitled

Improving Undergraduate Education. Additionally, he successfully sought election by his peers to a position on the Departmental Advisory Committee, achieving such honor on May 23, 1968.

It is plaintiff's claim and position that defendant Dunham, Chairman of the Department of Social Sciences, aware that with Dr. Hildebrand's election, a majority of the members of the Advisory Committee were nontenured, began an effort aimed at plaintiff's dismissal. In early June of that year, plaintiff met with defendant Dunham. This meeting is provided for by the Departmental By-Laws, and is to cover the individual's "professional standing and prospects."[4] Dr. Dunham and Dr. Hildebrand discussed the latter's professional goals, the tenure system at M.S.U. and the fact that he was set up for reappointment. The evidence does not indicate that this meeting was particularly acrimonious.

On July 2, 1968, during the summer recess, and while Dr. Hildebrand was off-campus, Dr. Dunham met with a number of the full professors of the department. The upcoming reappointment of Dr. Hildebrand came up, and after consideration of this topic, the full professors in attendance voted unanimously not to recommend plaintiff for reappointment, and therefore, under the University Rules of Tenure, for tenure. This recommendation was accepted, and plaintiff was notified of this decision by a letter from Dr. Dunham dated September 12, 1968. (See Appendix) The substance of the letter reads:

"Dear Dr. Hildebrand:

As you will recall from our conversation last June 4, 1968 at the time when I was interviewing all non-tenured faculty in the department (as required by University College Faculty By-Laws), I raised the question of tenure with you and I pointed out the many considerations which go into a tenure decision. The terms of your appointment as Associate

Professor require that this decision be reached and made known to you at least nine months prior to termination date of your appointment period (August 31, 1969).

With the full knowledge of the departmental Advisory Committee (as you will also recall) I had earlier indicated that I would confer with the full professors of the department concerning personnel decisions. I held such a meeting with those persons holding professorial rank and who were available on July 2, 1968.*

After extensive discussion with this group the full professors unanimously voted to recommend to the department chairman that tenure not be accorded to you at the conclusion of your current appointment period.

Following the receipt of this recommendation, the department chairman discussed the proposed action with the Dean of the College and the recommendation of the full professors not to accord tenure to you was accepted.

Should you care to review this action with me, I will be pleased to discuss the various considerations which are involved."

Upon receipt of this letter, plaintiff sought out Dr. Dunham and requested a meeting with his colleagues of full professor rank in order that he could present his side. This was granted, and Dr. Hildebrand met with them on September 23, 1968, but they did not change their vote. On November 22, 1968, defendant Carlin, Dean of the University College formally notified plaintiff that he had accepted Dr. Dunham's recommendation, and that he would not be reappointed. Plaintiff's next recourse was through the Departmental Advisory Committee on which he served. At the November 20, 1968[5] meeting of the Committee, Dr. Hildebrand submitted a motion that the Committee go on record to the effect that the departmental by-laws had been violated in the nonrenewal of plaintiff, and that he should be granted tenure. After

discussion, the motion was tabled until a special meeting called for November 26. At this later meeting,[6] Dr. Hildebrand's motion was the subject of extensive discussion, as were the department by-laws. Ultimately, a motion similar to that submitted in the November 20 meeting was defeated.

At the December 23, 1968 Advisory Committee meeting, Dr. Hildebrand's nonrenewal again came up for discussion.[7] After consideration, the Committee eventually approved a motion to the effect that it was unable to secure evidence justifying Dr. Hildebrand's nonrenewal.

Plaintiff next brought his case to the All University Tenure Committee, which ruled in an opinion issued April 28, 1969 that no violation of plaintiff's rights occurred through the Social Science Department's nonrenewal action. He also wrote the President of the University without avail.[8] Dr. Hildebrand then filed two unsuccessful unfair labor practice charges with the Michigan Employment Relations Commission. After the Michigan Court of Appeals and Supreme Court denied motions for leave to appeal these matters, the instant case followed. Plaintiff ceased his employment with the University on August 31, 1969.

Defendants responded to the complaint herein with motions to dismiss. After briefs, and *amicus* briefs were accepted by the Court, the then District Judge Albert Engel in an opinion considering *Board of Regents* v *Roth*, 408 U.S. 1, 92 S. Ct. 2701, 33 L.Ed 2d 548 (1972), dismissed Count III of the complaint, involving a state law contract claim.[9] He also ruled that although the defendant Board could be held to respond to the injunctive relief requested in the complaint, it was not a "person" under § 1983, and therefore was not liable for damages. Count I and II of the complaint, based on the federal Constitution and the civil rights statutes, Judge Engel refused to dismiss, and these claims constitute the present form of this lawsuit.

Later, in June of 1973, plaintiff moved for a preliminary injunction requiring defendants to rehire him. Judge Engel denied that motion. This was followed by a successful motion to amend the complaint. These amendments sought to clarify plaintiff's version of the circumstances leading to his nonrenewal, and the motivations behind those actions. After a pretrial conference, defendants renewed their motions for dismissal and/or summary judgment. After reviewing developments in the law, since Judge Engel's earlier opinion, this Court concluded, as did Judge Engel, that the complaint did state a valid civil rights claim against defendant Board, and that summary judgment on the claims embodied in the complaint would be premature.[10]

The case then proceeded to jury trial and during such proceedings, questions were raised as to the propriety of trying the case to a jury. On the fifth day of trial, and after extensive consideration, the Court concluded that this case was more properly one for the Court, and for that reason it was decided to use the jury in an advisory capacity to the Court pursuant to Rule 39.[11] The jury was so instructed at the close of proofs, and they returned answers to written interrogatories.[12] At the same time, the parties were requested to provide the Court with proposed findings of fact and conclusions of law. This having been done, the case became ripe for decision by the Court.

II. SUBSTANTIVE ISSUES

A. Introduction

At the outset, we address ourselves to the principles that will guide our examination of Mr. Hildebrand's case. The touchstones of our analysis must be *Board of Regents of State Colleges* v *Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed. 2d 548 (1972) and *Perry* v *Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed. 2d 570 (1972). In these cases the Court set out the procedural due process rights a nontenured faculty member acquires at the time of his discharge.

"The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite." *Roth, supra* at 569-570. (Footnote omitted).

The Court in *Roth* then went on to explain at some length the scope of the protected liberty interest:

"The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For '[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." Wisconsin v. Constantineau, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515; Wieman v. Updegraff, 344 U.S. 183, 191, 73 S.Ct. 215, 219, 97 L.Ed. 216; Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 71 S.Ct. 624, 95 L.Ed. 817; United States v. Lovett, 328 U.S. 303, 316-317, 66 S.Ct. 1073, 1079, 90 L.Ed. 1252; Peters v. Hobby, 349 U.S. 331, 352, 75 S.Ct. 790, 801, 99 L.Ed. 1129 (Douglas, J., concurring). See Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 898, 81 S.Ct. 1743, 1750, 6 L. Ed.2d 1230. In such a case, due process would accord an opportunity to refute the charge before University officials." Footnote omitted.

* * *

Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to

take advantage of other employment opportunities. The State, for example, did not invoke any regulations to bar the respondent from all other public employment in state universities. Had it done so, this, again, would be a different case." 408 U.S. at 573-574, 92 S.Ct. at 2707.

Roth also sketched the basic outlines of the property interest inhering in this form of employment.

"To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Thus, the welfare recipients in Goldberg v. Kelly, *supra*, had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so.

Just as the welfare recipients' "property" interest in welfare payments was created and defined by statutory terms, so the respondent's "property" interest in employment at Wisconsin State University-Oshkosh was created and defined by the terms of his appointment." 408 U.S. at 577-578, 92 S.Ct. at 2709

Perry v *Sindermann, supra*, sets out in more detail the circumstances under which a nontenured professor's property interest in his employment rises to fourteenth amendement dimensions.

> "We have made clear in *Roth, supra*, at 577, 92 S.Ct., at 2709, that "property" interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, "property" denotes a broad range of interests that are secured by "existing rules or understandings." *Id.*, at 577, 92 S.Ct., at 2709. A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing. *Ibid.*
>
> A written contract with an explicit tenure provision clearly is evidence of a formal understanding that supports a teacher's claim of entitlement to continued employment unless sufficient "cause" is shown. Yet absence of such an explicit contractual provision may not always foreclose the possibility that a teacher has a "property" interest in reemployment. For example, the law of contracts in most, if not all, jurisdictions long has employed a process by which agreements, though not formalized in writing, may be "implied." 3 A. Corbin on Contracts §§ 561-572A (1960). Explicit contractual provisions may be supplemented by other agreements implied from "the promisor's words and conduct in the light of the surrounding circumstances." *Id.*, at § 562. And, "[t]he meaning of [the promisor's] words and acts is found by relating them to the usage of the past." *Ibid.*
>
> A teacher, like the respondent, who has held his position for a number of years, might be able to show from the circumstances of this service—and from other relevant facts—that he has a legitimate claim of entitlement to job tenure. Just as this Court has found there to be a "common

law of a particular industry or of a particular plant" that may supplement a collective-bargaining agreement, United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 579, 80 S. Ct. 1347, 1351, 4 L.Ed.2d 1409, so there may be an unwritten "common law" in a particular university that certain employees shall have the equivalent of tenure." 408 U.S. at 601-602, 92 S.Ct. at 2699-2700. (emphasis added).

Chief Judge Arraj summarized the formula succinctly in *Weathers* v *West Yuma County School District R-J-1*, 387 F. Supp. 552 (D.Col. 1974):

> "In short, plaintiff must establish an *objective* expectation of continuing employment—an expectation which would be commonly recognized and which is evidenced either by explicit statutory or contractual entitlement or by the implicit policy and practices of the parties.
>
> As to the "liberty" interest which might arise from nonrenewal of an employment contract, the Court recognized two means of demonstrating such interest: first, where the nonrenewal occurs under such circumstances or after such accusations as "might seriously damage [plaintiff's] standing and associations in his community." [Board of Regents v. Roth, *supra* at 573, 92 S. Ct. at 2707]; and second, where the nonrenewal and related circumstances impose on the teacher "a stigma or other disability that foreclose[s] his freedom to take advantage of other employment opportunities." [*Id.*]
>
> The success of plaintiff's procedural due process claim, then, depends on our finding that he possessed either the "property" interest or one of the two "liberty" interests just enumerated." 387 F. Supp. at 556-557

Finally, in approaching a case such as this, we should be mindful that:

> "The relatively placid life of the college campus of the past has not prepared either the administrators or students for

> their respective responsibilities in maintaining an atmosphere in which divergent views can be asserted vigorously, but civilly, to the end that those who seek to be heard accord the same right to all others."
> Healy v James, 408 U.S. 169, 195, 92 S.Ct. 2338, 2353 (1972) (Chief Justice Burger concurring).

We thus undertake a search of the evidence, particularly that regarding Dr. Hildebrand's appointment and nonrenewal, in order to ascertain the reasons for his discharge and to determine whether there were "rules or mutually explicit understandings" which would bring Dr. Hildebrand under the umbrella of constitutional due process protections.

B. "Liberty" Interests

Dr. Hildebrand maintains that he was discharged in reprisal for his disagreements with the teaching methods used in the department and for his candidacy for the Departmental Advisory Committee. Although a nontenured teacher's termination may not be solely for exercise of first amendment rights, *Perry* v *Sindermann, supra*, at 596-98; *Simard* v *Board of Education*, 473 F.2d 988 (2d Cir. 1973); *Skehan* v *Board of Trustees*, 501 F.2d 31 (3d Cir. 1974), *vacated and remanded on other grounds*, 421 U.S. 983 (1975), the fact that first amendment activity played a part, even a *substantial* part, in the decision to terminate the teacher will not necessarily render the termination a constitutional violation. *Mt. Healthy City School District* v *Doyle*, 45 U.S.L.W. 4079, 4082 (U.S., Jan. 11, 1977). Under *Mount Healthy*, a teacher by engaging in constitutionally protected conduct may not be placed in a *better* position that he would have occupied had he done nothing. It is sufficient that the employee be placed in *no worse* position than if he had not engaged in the first amendment conduct.

Interrogatory 4 presented the advisory jury with the first amendment issue. In that interrogatory, they were asked in part:

> "Did any of the defendants knowingly deprive plaintiff John R. Hildebrand of reappointment at Michigan State University . . . because of plaintiff's candidacy for Departmental Advisory Committee?"

To that interrogatory, the jury answered "no." Review of the evidence leads the Court to the same conclusion. Plaintiff contends that defendants Dunham, Snyder and Carlin became concerned about his election to the Departmental Advisory Committee, both because of his disagreements with departmental procedures, and because with him a majority of the Committee would be nontenured. As a result, these defendants are said to have entered into a conspiracy to remove plaintiff from the department.

We search in vain, however, for proof of the specific allegations necessary to substantiate this claim. Dr. Hildebrand testified that at one point he was told by defendant Snyder, who was at the time serving as an Administrative Assistant in the department, that "none of you young squirts elected to the Advisory Committee will ever receive tenure." He also stated that when notified that the Advisory Committee had a majority of nontenured members, defendant Carlin giggled, thus evincing the existence of a conspirary. At the very best, these tidbits provide murky offerings of a conspiracy. To say the least, the Court fails to see how the humorous reaction of the Dean to a development in one of the departments he oversees can indicate a conspiracy. In addition, defendant Snyder denied under oath ever making the "young squirts" statement, and this testimony is corroborated by that of James Wagman, another Associate Professor in the department.

More important, though, is the body of evidence tending to show perfectly valid justifications for Dr. Hildebrand's non-

renewal. Dr. Hildebrand's own testimony concedes that student evaluations of his teaching were abnormally low. Defendant Dunham, plaintiff's immediate academic superior, testified that at the annual conference held routinely with associate professors in the department, Dr. Hildebrand expressed displeasure at his teaching load, and the work he had to do in various committees. Dr. Come, another member of the Social Science department, who also served with Dr. Hildebrand on the committee on Examinations, stated that plaintiff's contributions to the Committee were less than one could reasonably expect. David Klein, another of Hildebrand's colleagues, testified that plaintiff's teaching was not impressive, that the colloquim he gave was not a scholarly presentation comparable to those given by others, and that Dr. Hildebrand's published book[13] lacked depth commensurate with plaintiff's experience. As the Eighth Circuit very aptly points out in *Watts* v *Board of Curators, University of Missouri*, 495 F.2d 384 (8th Cir. 1974):

> "Fitness for teaching depends on a broad range of factors. Beilan v. Board of Education, 357 U.S. 399, 406, 78 S.Ct. 1317, 2 L.Ed.2d 1414 (1958). A college has a right to expect a teacher to follow instructions and to work cooperatively and harmoniously with the administration. It is the burden of the teacher to show that the decision not to renew a contract was in fact a pretext, and that the decision was actually based on the Board's disapproval of the exercise of a constitutionally protected right by the teacher. *Cf.* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 803-804, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)."
> 495 F.2d at 389.

Furthermore, in this circuit it has been held that a teacher can be nonrenewed if the person's "pedagogical attitudes" do not measure up. See *Hetrick* v *Martin*, 480 F.2d 705 (6th Cir. 1973).

On the evidence presented, it is impossible to conclude that the exercise of first amendment rights was a substantial cause

for his termination. Moreover, even if the evidence were sufficient to support a finding that plaintiff's termination was substantially caused by constitutionally protected activity, it is clear that there were also substantial bona fide non-first amendment reasons for the defendants' actions, which under *Mt. Healthy* would preclude the finding of a constitutional violation. Moreover, the Court finds none of the elements enumerated in *Roth* as indicia of a deprivation of "liberty." Here the Court finds no charges impugning Dr. Hildebrand's integrity, good name, or morality. Dr. Hildebrand did testify that since his separation from Michigan State he has been unemployed although seeking employment elsewhere. He also testified, however, that he has spent much of his time amassing materials for this case and visiting his former colleagues. He also wife, who was employed at the same time that plaintiff was, remains as a member of the faculty and both of them have spent several days in the courtroom while other cases are litigated. Dr. Hildebrand has not, moreover, been barred from any particular lines of employment, in academia or elsewhere. On this subject, the *Roth* opinion is explicit, stating in note 13 that:

> "[13] The District Court made an *assumption* "that nonretention by one university or college creates concrete and practical difficulties for a professor in his subsequent academic career." 310 F. Supp., at 979. And the Court of Appeals based its affirmance of the summary judgment largely on the premise that "the substantial adverse effect non-retention is likely to have upon the career interests of an individual professor" amounts to a limitation on future employment opportunities sufficient to invoke procedural due process guarantees. 446 F.2d, at 809. But even assuming, *arguendo*, that such a "substantial adverse effect" under these circumstances would constitute a state-imposed restriction on liberty, the record contains no support for these assumptions. There is no suggestion of how nonretention might affect the respondent's future employment prospects. Mere proof, for example, that his record of

nonretention in one job, taken alone, might make him somewhat less attractive to some other employers would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of "liberty." Cf. *Schware* v. *Board of Bar Examiners*, 353 U.S. 232."

408 U.S. 564, 574.

Indeed, at least with respect to the statements alleged to have been the basis for nonrenewal, the Court harbors doubts as to whether they are protected by the first amendment at all. In *Pickering* v *Board of Education*, 391 U.S. 563, 88 S.Ct. 1731 (1968), the Supreme Court sought to strike a balance between a teacher's first amendment freedom of expression and a school district's legitimate interest in the efficiency of its endeavors. In the process, the Court, through its examination of the teachers' statements, attempted to "indicate some of the general lines along which an analysis of the controlling interests should run." 391 U.S. at 569, 88 S.Ct. at 1735. Although the record in this area is not fully developed, it appears that Dr. Hildebrand's statements differ from those in *Pickering* in a number of significant aspects. In *Pickering* the plaintiff took issue with the School Board's allocation of funds, stating his opinions in a letter to the editor of the local newspaper. Here, many of Dr. Hildebrand's statements disagreeing with the department's methods appear to have been made in private conversations with colleagues.

In addition, the statements in *Pickering* were directed against the teacher's ultimate employer and did not involve persons with "the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning." 391 U.S. at 570, 88 S.Ct. at 1735. In this case, however, the content of plaintiff's expressions runs to a much greater extent towards his direct superiors and immediate colleagues, further attenuating the force of first amendment protections here.

We therefore find no deprivation of "liberty" and conclude, as did the Roth Court:

> "Hence, on the record before us, all that clearly appears is that the [plaintiff] was not rehired . . . at one university It stretches the concept too far to suggest that a person is deprived of "liberty" when he simply is not rehired in one job but remains as free as before to seek another. *Cafeteria Workers* v *McElroy, supra*, 367 U.S. at 895-896, 81 S.Ct. at 1748-1749, 6 L.Ed. 2d 1230."

C. "Property" Interests

Plaintiff contends that his appointment to the Social Sciences department vested him with a "reasonable and objective expectancy of continued employment and tenure."[14] However, in light of the principles of *Roth* and *Sindermann, supra*, and the terms of Dr. Hildebrand's appointment, quoted earlier, this argument cannot stand. Although *Roth* and *Sindermann* make it clear that a protected tenure interest may arise from arrangements not formally written or included in the employment contract, incorporated into Dr. Hildebrand's appointment are the clear and explicit provisions of the University's formally promulgated tenure policy. This is rather obviously intended, among other things, to eliminate the "de facto tenure" situation. *See Cusumano* v *Ratchford*, 507 F.2d 980, 984 (2d Cir. 1974). The applicable portions of the tenure policy speak only of a two year appointment and make no mention of continued employment thereafter. They state only that tenure inures as of reappointment. Such language cannot be said to embody any "mutually explicit understanding" which would support his "claim to entitlement to the benefit," to use the words of *Sindermann*. Dr. Hildebrand as much as conceded this when during direct examination he admitted he had a *probationary* position. Furthermore, plaintiff has failed to bring forth any communications with superiors, informal policies or "common law" of the University which of itself gives rise to a legitimate expectation of continued employment,

or is otherwise in derogation of the University's published tenure policies. *See Moore* v *Kibbee*, 381 F. Supp. 834 (E.D.N.Y. 1974). We therefore must conclude that Dr. Hildebrand had nothing more than a mere "unilateral expectation," clearly insufficient under pronouncements in either *Roth* or *Sindermann*.

Nonetheless, Dr. Hildebrand still vigorously contends that the circumstances of his nonrenewal merit him relief. He argues that his position with the University gave him at least the expectation that any decisions with regard to his employment would be made in accordance with the University's own established procedural regulations and that in the course of his nonrenewal, these standards were violated in a number of respects. This argument gains support from the oft-cited case of *Ferguson* v *Thomas*, 430 F.2d 852 (5th Cir. 1970). In that case it was pointed out that:

> ". . . . a college can create an obligation as between itself and an instructor where none might otherwise exist under the legal standards for the interpretation of contract relationships regularly applied to transactions in the marketplace if it adopts regulations or standards of practice governing nontenured employees which create an expectation of reemployment."
>
> 430 F.2d 856.

As this was the subject of considerable effort on the part of plaintiff's counsel, and much of the trial, we will deal with this argument in some detail. The most forcefully advanced violations alleged by plaintiff revolve around the July 2, 1968 meeting at which it was voted not to renew Dr. Hildebrand's appointment. Plaintiff contends that the timing and format of this meeting, along with the fact that his tenure was not acted on first by the Departmental Advisory Committee, constitute violations of the Social Science Department By-Laws. In support of this plaintiff cites Section IV. (2) of the Appendix to the

Departmental By-laws. This section sets forth a procedure for considering the reappointment of a department member:[15]

"(2) *At time of reappointment*

(a) Department chairman confers with Advisory Committee and/or tenured staff.

(b) The Dean and each non-tenured faculty member will confer at least once every two years. Department Chairmen will confer with non-tenured faculty at least once a year regarding the faculty member's professional standing and prospects. (Univ. College By-Laws)

(c) Recommends to the Dean."

Plaintiff relies primarily, as he must, on part (a) of this section,[16] alleging that the timing of his meeting during summer break effectively eliminated tenured Associate Professors of the department from consideration of his tenure. The Court placed this issue squarely before the advisory jury in interrogatory 2, quoted in footnote 12 *supra*. The jury found that these regulations had been complied with, and a review of the evidence leads the Court to the same result.

The language of the section itself gives the Department Chairman a choice. He may deal either with the advisory committee, *or* with "tenured faculty." There is no requirement that he deal with *the* "tenured faculty," or with the advisory committee, either first or exclusively. This interpretation is corroborated by testimony on the nature and history of this department's by-laws. Chairman Dunham testified that his predecessor sometimes consulted no one in making tenure decisions, and that in an attempt to codify a set of guidelines, he, Dunham, supervised the formulation of this Appendix in 1964. Dean Carlin testified that this Appendix was understood to give the Chairman alternative methods in arriving at tenure decisions, and that a meeting with less than all the tenured department faculty would be within the meaning of the Appendix.

Plaintiff also argues that a change in the title of the Appendix to "APPENDIX (NOT PART OF BY-LAWS)" was an attempt by the defendants to cover up their violations of the reappointment procedures therein.[17] This was denied from the stand by Dr. Snyder, who stated that was done to clarify that these provisions had never intended to be part of the by-laws themselves. He testified that Dr. Hildebrand's nonrenewal did not inspire the change. In light of our interpretation of the language of Section IV (2) above, the exact title of these provisions is not important. Irrespective of what they are called, they were in print during the periods in question here, and represent, at the very least, "law of the shop," within the meaning of *Sindermann*. Thus, the relevant issue is not what they were called, but whether they were violated.

With reference to the July meeting itself, we find that at the bottom of Chairman Dunham's letter of September 12, 1968, notifying Dr. Hildebrand of his nonrenwal (reproduced in the Appendix), there is a tabulation of the faculty present at the meeting. Including Professor Dunham, eleven members were present, and five were absent, one of them being on leave from the University. Dr. Hildebrand states that the names of two tenured Associate Professors apparently were omitted from that tabulation. However, Professor Lombardi's testimony reveals that one was on leave in England, and the other was leaving for Mexico. Nonetheless, even if all the rest of the tenured department faculty had been present and had voted in favor of Dr. Hildebrand's tenure, in light of the unanimous vote of the eleven who were there, a majority of the department still would have opposed plaintiff's tenure.

Chairman Dunham's testimony provides additional insights into the background of the July meeting. In January 1968, the full professors of the department met with Chairman Dunham, and expressed their desire to have more input in departmental decision making. Following this was the Departmental Advisory Committee election, in which

Dr. Hildebrand was elected. In June of that year was the previously described yearly meeting between Chairman Dunham and Dr. Hildebrand. At that meeting, Chairman Dunham testified that he pointed out the desire of the full professors, along with the fact that the Advisory Committee had a majority of nontenured members. Under these circumstances, Dunham told Hildebrand that he considered it inappropriate and contrary to the concept of tenure at Michigan State for tenure decisions to be made by a group predominated by nontenured personnel. Plaintiff did not object to this at the time, according to Dr. Dunham, and he therefore set into motion the procedures leading to the July 2 meeting.

In May of 1968, according to defendant Dunham, information on Dr. Hildebrand was circulated to the full professors. Prior to the meeting, Dr. Dunham testified that he made no attempt to influence the voting, and that he had no preconception as to the outcome of the vote on Dr. Hildebrand. Citing Section V. B. of the University Rules of Tenure, which requires notification of nonrenewal by the December 15 preceding the expiration of an appointment,[18] Dr. Dunham testified that the meeting was held, and Dr. Hildebrand notified of its results as early as possible, so as to allow him the maximum time in which to seek other employment. Much of the testimony is corroborated by Dr. Donald Come, who also attended the July 2 meeting. He testified that he was contacted neither by Dr. Dunham nor by Dr. Snyder, Dunham's assistant, prior to the meeting. There were no credible evidence presented indicating that the meetings of the committee was unusual in purpose or time.

For these reasons, the Court is unable to find either a violation of the departmental bylaws or the creation of a protected property interest by virtue of the July 2, 1968 meeting and its surrounding circumstances. Furthermore,

the Sixth Circuit, in a recent decision, indicated that a failure of a public agency to follow its own regulations will not necessarily amount to a deprivation of property without due process of law. *Bates* v *Sponberg*, No. 75-2212 (6th Cir. Dec. 20, 1976) (Engel, Edwards & Green, J.J.). Under *Bates* only where "the agency's disregard of its own rules results in a procedure which in itself impinges upon due process rights . . . should a federal court . . . intervene in the decisional processes of state institutions." No. 75-2212, at 7-8. While a departure from prescribed administrative procedures might constitute a violation of administrative law, only where the resulting procedure did not of itself afford due process could there be a constitutional violation. It is clear that the hearing accorded plaintiff due process and his contention that there was a failure to comply with prescribed procedures resulting in the deprivation of a property interest without due process of law is consequently without merit.

The other major "property" interest argument made by plaintiff revolves around his contention that he had a so-called "joint appointment" in the Department of Social Sciences, and in the Latin American Studies Center of the University. Plaintiff argues that since his appointment was in two departments, he was entitled to separate due process nonrenewal proceedings by each department. In support of his joint appointment, plaintiff cites the appointment form he received from the University Secretary, approving his "appointment as Associate Professor of Social Science and the Latin American Studies Center . . . ." This argument was conclusively refuted at trial, however, both by exhibits and by testimony.

Defendant's Exhibit B is the University "Appointment Recommendation" for Dr. Hildebrand. (See Appendix). The Provost of the University, defendant Cantlon, testified that this was the official document presented to the Board of

Trustees concerning Dr. Hildebrand's appointment, and on file with the University. He also testified that it was not customary to transmit this document to the individual faculty member. The document lists Dr. Hildebrand as being in both the Social Science department and the Latin American Studies Center. However, under "Comments" the form clearly provides: "Title affiliation only with the Latin American Studies Center." The recommendation also shows that all his salary was to come from the Social Science Department payroll. Provost Cantlon further testified that the appointment received by plaintiff was shorthand rendering of the exact nature of the appointment by the University Secretary, intended primarily to inform the new faculty member of the fact that he had been hired, and of his salary rate; and that if plaintiff had a joint appointment the recommendation would so read. The title affiliation, according to the Provost, was a basically complimentary gesture to the faculty member, and created no duty on the part of his academic department chairman to consult with other departments on tenure matters.

Further light was shed upon Dr. Hildebrand's status in the Center by the deposition of Garland Wood, the Director of Latin American Studies Center, admitted during plaintiff's case. Dr. Wood testified that the Center was an organization of scholars and interested persons who shared [illegible] for Latin American affairs. The Center numbered 90 to 100 members, representing many disciplines of the University. The members would invite in guest lecturers, and organize activities along the line of the Center's interest. Dr. Wood also testified that while there were a few staff members whose salaries were paid in whole or in part by Center funds, Dr. Hildebrand was not one of those. It is also clear from Dr. Wood's testimony that he was not regularly consulted concerning the tenure of those associated with the Center. In light of this evidence, we must conclude that Dr. Hildebrand had neither a joint appointment, nor did his affiliation with the Latin American

Studies Center give him any objective mutually explicit expectation of tenure or of additional proceedings with respect to tenure.

IV. ADDITIONAL CONSIDERATIONS

After Dr. Hildebrand received notice of his nonrenewal, he requested, and was granted a personal meeting with the full professors on September 23, 1968. Dr. Come testified that this action was unprecedented.[19] At that time, the professors decided not to change their earlier recommendation. The case was then reviewed by Dean Carlin, the Departmental Advisory Committee, the All-University Tenure Committee, the Board of Trustees, the President of the University, on two occasions by the Michigan Employment Relations Comission, and finally by this Court.

Under our Constitution:

> "The "standards of procedural due process are not wooden absolutes."[9] The sufficiency of the procedures must be judged in the light of the totality of the circumstances. The fundamental requirement of due process "is the opportunity to be heard, 'at a meaningful time and in a meaningful manner.' * * * This opportunity must be 'appropriate to the nature of the case.' * * * 'The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.' "[10]

[9] Ferguson v. Thomas, 430 F.2d 852, 856 (5th Cir. 1970).
[10] Ahern v. Bd. of Education, 456 F.2d at 403.

Birdwell v *Hazelwood School Dist.*, 491 F.2d 490, 495 (8th Cir. 1974).

In light of these concepts, and the more specific due process formulas set forth in *Roth* and *Sindermann*, it

certainly appears to this Court that plaintiff received a far greater amount of concerned attention than that required under standards of due process. For a nontenured person such as Dr. Hildebrand, *Roth* and *Sindermann* required none of these hearings held in this case. Nor do they even mandate a listing of the reasons for nonrenewal. Thus, although not dispositive of the case, the Court must conclude that Dr. Hildebrand's rights were fully vindicated through the mechanism of the July 2, 1968 meeting and the subsequent notification by Dr. Dunham. This Court was and is amazed to observe how most of the administration of a major university can be required to spend days in vindication of its procedures in a fourth or fifth hearing of a nontenured teacher when evidence of his ineffectiveness clearly abounds.[20]

Furthermore, although the holding on the jury trial issues eliminates the necessity to directly confront the issue, this Court's examination of the evidence leads to the rather inescapable conclusion that a directed verdict would have been justified here at the close of the evidence. A successful motion of this nature requires that:

> "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims."
>
> *Brady* v *Southern Railroad*, 320 U.S. 476, 478-479, 64 S.Ct. 232, 88 L.Ed. 239 (1943).

Considering the strong evidence already surveyed at some length, this burden certainly appears to have been

met. Indeed, a successful directed verdict at the close of plaintiff's case also seems a distinct possibility. By the end of plaintiff's case, the evidence of a conspiracy to remove him had been fully developed and failed. In addition, the testimony of Dr. Wood concerning the Latin American Studies Center, and the testimony of Dr. Snyder and Dr. Lombardi with respect to the By-Laws and the July 2 meeting was fully developed.

V. DEMANDS FOR JURY TRIAL

At the outset, both defendant and plaintiff demanded jury determination of certain aspects of this case. Defendant requested a jury determination of "the factual issues in the cause," while plaintiff requested a jury assessment of "the liability for and the amount of money damages." The parties' requests raise interesting problems in the complex area of the seventh amendment right to a jury trial in civil cases.

The seventh amendment confers a right to a jury trial in "suits at common law." Although the basic thrust of the amendment is to preserve the right to a jury trial as it existed in 1791, the concept "common law" has evolved to embrace all suits not within equity or admiralty jurisdiction. *Curtis* v *Loether*, 415 U.S. 189, 193 (1974). Thus the right to a jury trial may lie for congressionally-created causes of action nonexistent at the framing of the seventh amendment.[21] *Id.* at 193-94. When a statutory cause of action comes before the Court, it must be carefully analyzed to determine whether the issues raised are inherently equitable or inherently legal. Where distinct legal and equitable issues are involved, there may be a right to a jury determination on the legal issues, while the equitable issues are solely for the Court.[22]

There are three essential facets to this inquiry. First, the Court must determine whether the relief sought is "legal"

or "equitable."[23] Second, it must be determined whether the issues are within "the practical abilities and limitations" of a jury.[24] The final consideration is whether the issues are such as would have been tried by a jury at the time the seventh amendment was adopted.[25] *Marr* v *Rife*, 363 F. Supp. 1362, 1363 (S.D. Ohio 1973), *citing Ross* v *Bernhard*, 396 U.S. 531, 538 n. 10 (1970); *NLRB* v *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *United States* v *Louisiana*, 339 U.S. 699 (1950); *Rogers* v *Loether*, 312 F. Supp. 1008 (E.D. La. 1970); 9 Wright & Miller, Federal Practice & Procedure: Civil § 2302 (1971).

When such an analysis discloses a distinct legal issue, that issue is for the jury to determine. Nevertheless, there is no *unqualified* right to have such an issue placed before the jury. In addition to establishing that the *nature* of the issue gives rise to a right to jury trial, a party must establish a minimal factual predicate—sustaining his burden of coming forward with the evidence—before he is entitled to have the jury decide the issue. Thus in *Lynch* v *Pan American World Airways*, 475 F.2d 764, 765 (5th Cir. 1973), the court stated in a per curiam opinion that "unsupported allegations for compensatory and punitive damages" could not "unilaterally alter the genre" of an essentially equitable proceeding.

Plaintiff's allegations can be divided into two categories. First, plaintiff alleges that the decision not to extend him tenure was prompted by his exercise of first amendment rights. Specifically, plaintiff Hildebrand alleges that he was not given tenure because of his candidacy for and election to the Departmental Advisory Committee and because of certain criticism of existing conditions within the Department of Social Sciences. Secondly, plaintiff alleges that he was deprived of some property or liberty interest without due process of law.

The individual factual issues raised by these allegations must be analyzed to determine whether a jury trial is approp-

riate for some or all of them.[26] A primary consideration is the nature of the relief sought. Plaintiff seeks four basic categories of relief: (1) reinstatement, (2) back pay, (3) compensatory damages, and (4) punitive damages. Reinstatement and back pay are considered inherently equitable forms of relief.[27] Compensatory and punitive damages, on the other hand, are inherently legal remedies. The factual issues of the alleged constitutional violation are common to both the legal and the equitable remedies. The issues vary, however, with respect to the problem whether the constitutional violation *caused* the injury to be remedied by the relief sought. It is evident that the lost employment and wages to be remedied by reinstatement and back pay are direct consequences of the University's action. The matter of causation of the injuries to be remedied by the compensatory damages, however, is less self-evident.

Plaintiff seeks damages for (1) injury to reputation, (2) injury to future earning capacity, (3) embarassment and hurt feelings, and (4) deprivation of a self-fulfilling occupation. Plaintiff also seeks punitive damages. These remedies are considered inherently legal. Furthermore, the complexity and interrelatedness of the issues, while creating potential problems, is not so inordinate to mandate withdrawal of the issues from the jury. Finally, these are matters that would have historically been handled by a law court rather than a court of equity.

Nevertheless, in addition to being inherently legal by nature, the issues must have a minimal factual predicate before there is a right to have them determined by a jury. They must not be mere "unsupported allegations" as in *Lynch* v *Pan American World Airways, supra*. The issues concerning the injuries to be remedied by the compensatory damages must be examined to determine whether the underlying issues establishing a cause of action under sections 1983 and 1985 are to be determined by a jury.

Plaintiff claims injury to his reputation and earning capacity. Plaintiff has not introduced actual evidence of the impairment of his reputation and future earning capacity. Nevertheless, in the proper circumstances, such injuries can be inferred from discharge from employment. Under the ordinary circumstances attendant to termination of a professor, however, the Supreme Court has indicated that such injuries may *not* be presumed:

> "The District Court made an *assumption* "that nonretention by one university or college creates concrete and practical difficulties for a professor in his subseuqent academic career." . . . But even assuming, *arguendo*, that such a "substantial effect" . . . would constitute a state-imposed restriction on liberty, the record contains no support for these assumptions. There is no suggestion of how nonretention might affect the respondent's future employment prospects. Mere proof, . . . that . . . nonretention in one job, taken alone, might make him somewhat less attractive to some other employers would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of "liberty." *Board of Regents* v *Roth*, 408 U.S. 564, 574 n. 13 (1972) (citations omitted) (emphasis by the Court).

This language in *Roth* imports that mere nonretention is insufficient to establish injury to reputation and earning capacity. Plaintiff here made no concerted attempt to obtain alternative employment, instead choosing to devote his energies primarily to gathering materials for this case and information on the subject of civil liberties in general. As a result, there is no basis for comparing pre- and post-termination reputation and earning capacity. Consequently, plaintiff has failed to establish facts sufficient to permit the issues to be determined by the jury, and the assertions of injury to reputation and earning capacity amount to little more than the "unsupported allegations" rejected in *Lynch* supra.

Plaintiff has also alleged that he is entitled to recovery for "embarassment" and "hurt feelings." Circumstances have been established from which embarrassment could be easily inferred. Dr. Hildebrand demanded and was afforded an opportunity to confront personally those members of the faculty voting to terminate his employment with the University. The situation was undoubtedly painful for him. In addition, Dr. Hildebrand continued to interact with his former colleagues after the decision had been made, giving rise to further embarrassing situations. A substantial part of any embarrassment suffered by Dr. Hildebrand stemmed from his own decision vigorously to pursue the vindication of his rights. This conscious choice thrust him into situations of confrontation with those professors voting not to renew his contract and with those individuals most aware of his nonrenewal and the alleged reasons for it. Dr. Hildebrand cannot be faulted for his choice. The fact remains, however, that there were other avenues open to him that would have minimized embarrassment and hurt feelings. Dr. Hildebrand, however, has continued to frequent the campus and the department even after he was terminated. Any embarrassment or hurt feelings attributable to Dr. Hildebrand's choice to confront the faculty, to engage in discussions with them, and to continue to visit the department and the campus, outside of the requirements of his position for the remainder of his term, did not flow from the defendants' alleged denial of his constitutional rights.[28]

In addition, no concrete evidence is before the Court demonstrating that plaintiff did in fact suffer the alleged mental distress. While such injury is not capable of verification with mathematical precision, and any such determination must rely heavily on the assertions of the injured party, some supporting evidence is necessary to render the issue more than a "unsupported allegation" leaving nothing for determination by the jury. Testimony of a physician, family members, or friends might have adequately established the fact of the alleged emotional injury, but no such testimony

was offered. In the absence of such evidence there was nothing for the jury to determine.

Plaintiff also seeks compensatory damages for lack of a self-fulfilling occupation. Plaintiff's testimony indicates that he did not devote his total energy to seeking another psoition, choosing to apply himself fully to obtaining reinstatement at Michigan State.[29] Furthermore, plaintiff testified that he spent substantial amounts of time tracking down information for the trial of this case and accumulating files on civil liberties. These actions cloud the issue whether defendants' alleged infringements of plaintiff's constitutional rights caused the lack of a self-fulfilling occupation. Dr. Hildebrand's testimony discloses that a more viorous pursuit of employment opportunities could have netted him a position either with a private consulting firm or Texas Tech. Furthermore, plaintiff testified that he applied only to four universities: Western Michigan, Oklahoma, Texas Tech, and Kansas State. In the overcrowded professorial job market these are certainly not the efforts of an individual in ardent pursuit of a job. Dr. Hildebrand's testimony, the only evidence on his ability to obtain employment elsewhere, discloses only lackluster job-seeking efforts. The conclusion that plaintiff's lack of a self-fulfilling occupation was substantially attributable to his own desire to remain at Michigan State is inescapable.

Furthermore, plaintiff does not appear to have been deprived of a self-fulfilling occupation during the interim between his termination and the hearing of this case. Dr. Hildebrand stated that he spent much time tracking down information for trial and amassing data on civil liberties, engaging in frequent discussions with his former colleagues. Although self-fulfillment as a faculty member of Michigan State University was now foreclosed to him, Dr. Hildebrand seems to have plunged himself into this new endeavor with as much energy as he ever devoted to his academic position. Plaintiff also testified that he managed his Kansas

farm. Therefore, whatever void nonrenewal left in his life was quickly filled, as Dr. Hildebrand applied himself to new-found pursuits. Plaintiff's testimony, the only evidence on this particular issue, establishes that there was little if any deprivation of self-fulfillment, leaving no substantial question of fact for determination by the jury.

Plaintiff also seeks punitive damages, alleging that defendants "maliciously, wantonly and oppressively" took the actions alluded to in the complaint, warranting an award of punitive damages. Punitive damages are only appropriate where there is some evidence of malice or where the imposition of punitive damages will deter the defendants from future constitutional violations. *Caplin* v *Oak*, 356 F. Supp. 1250 (S.D.N.Y. 1973). Mere allegations are insufficient—there must be actual evidence justifying punitive damages. *Rappaport* v *Little League Baseball, Inc.*, 65 F.R.D. 545, 548 (D. Del. 1975). Plaintiff alleges two instances of misconduct that could conceivably be characterized as malicious. First, Dr. Snyder was alleged to have made the statement "None of you young squirts elected to the Advisory Committee will ever receive tenure," upon plaintiff's election to the Committee. Secondly, plaintiff alleges that the decision not to renew his contract was made because of his election to the Committee, and was therefore done with malice. The question whether a jury trial is mandated to determine if these actions were sufficiently malicious to warrant award of punitive damages is academic, however. The jury concluded that the defendants did not knowingly deny Dr. Hildebrand reappointment because of his candidacy for the Advisory Committee.[30] The Court's examination of the plaintiff's allegations discloses no other conduct by the defendant sufficiently malicious to justify imposition of punitive damages. There is no basis for any inference or allegation that the procedures employed in reaching the decision were chosen maliciously and in bad faith. As a result, the matter of punitive damages presented no issue of fact for the jury to determine.

Lynch v *Pan American World Airways, supra,* established that the right to a jury trial cannot be predicated upon "unsupported allegations." The evidence must be sufficient to create an issue of fact for the jury to decide. Therefore, after the plaintiff had concluded his case, this Court determined that there were no legal issues remaining, and that the case sounded in equity. Accordingly, the jury was retained in an advisory capacity.

Under Rule 39 of the Federal Rules of Civil Procedure the court, upon motion or its own initiative, may determine that there is no right to a jury trial under the Constitution and laws of the United States. Exercise of this power is particularly warranted where there are complex and overlapping factual issues. Thus in *Hawkinson* v *Blandin Paper Co.*, 54 F.R.D. 517 (D. Minn. 1972), the court, in the related context of a Rule 39(b) motion for a jury trial, noted that the action was one "involving complex and interrelated considerations of federal and state law," and that "both legal and equitable relief is sought." *Id.* at 519. These considerations prompted the court to place the action upon the court calendar. *See also Jackson* v *Airways Parking Co.*, 297 F. Supp. 1366 (N.D. Ga. 1969).

The factual issues in Mr. Hildebrand's case are conceptually intertwined.[31] His first theory involves first amendment rights, and requires a factual determination whether he had certain discussions with or made statements communicated to department members and then whether these discussions or statements motivated the adverse faculty vote. This issue, in turn, constitutes a part of the due process theory. The preliminary question is whether due process applies, involving a factual finding that there was a liberty or property interest sufficient to call due process into play. The ensuing questions are whether the University's actions constituted a deprivation of the liberty or property interest and whether these actions constituted "due

process." These complexities are not, of course, sufficient in and of themselves to negate the right to a jury determination.[32] However, where the "inherently legal" issues are in reality only "unsupported allegations," as in *Lynch* v *Pan American World Airways, supra,* the Court's discretion under Rule 39(a) is properly exercised in favor of decision of the issues by the Court, retaining the jury in an advisory capacity.

In addition to the absence of a right to a jury trial of the issues surrounding the relief sought, there is no such right with regard to the substantive issues concerning the alleged constitutional deprivations. For the issue whether plaintiff was not offered tenure because of his candidacy for the Departmental Advisory Committee, the inquiry is largely academic. Among the four questions submitted to the jury was the following:

> "Did any of the defendants knowingly deprive plaintiff, John R. Hildebrand of reappointment at Michigan State University or knowingly deny him the type of hearing which he would otherwise be entitled to because of plaintiff's candidacy for Departmental Advisory Committee?"

The jury answered "no." The Court concurs in this finding, and the determination whether this issue and the issues flowing from it were properly cognizable by the Court or the jury becomes unnecessary.

Plaintiff also alleges that discussions with faculty members concerning departmental conditions prompted his nonrenewal in violation of his first amendment rights. Although plaintiff asserted this chain of events in his complaint, it received little emphasis during trial. No substantial evidence of these statements or discussions was introduced, nor was there evidence indicating any connection between plaintiff's statements or discussions and the decision not to

renew his contract. Consequently, there was insufficient evidence on this claim to present an issue for the jury, even if the issues involved were determined to be inherently legal.

Plaintiff also alleges certain due process violations. To claim due process protection, a plaintiff must establish that he had a liberty or property interest within the meaning of the fourteenth amendment. Plaintiff alleges that his first amendment rights constitute a protected liberty interest. The Court agrees. Nevertheless, plaintiff's first first amendment claim was found by the jury to be without merit, while his second first amendment claim offered no question of fact suitable for jury determination.

Plaintiff also alleges a liberty interest in his reputation and a right to be free of stigmatization. The Supreme Court has recently clarified the law in this area. In *Paul* v *Davis*, 424 U.S. 693 (1976), petitioner brought suit under 42 U.S.C. § 1983 (1970) alleging that the action of the local police department in publishing his name and photograph in a flyer listing known shoplifters injured his reputation and impaired his employment prospects, depriving him of liberty under the fourteenth amendment due process clause. The Court stated that "the interest in property alone which respondent seeks to vindicate in this action . . . is quite different from the 'liberty' or 'property' recognized" in cases under the due process clause. 424 U.S. at 711. The Court asserted that its previous decisions had established that injury to reputation alone, in the absence of loss of employment, was not cognizable as a liberty interest under the fourteenth amendment. In so doing, the Supreme Court interpreted *Wisconsin* v *Constatineau*, 400 U.S. 433 (1971), to permit consideration of injury to reputation under the due process clause only where the plaintiff is deprived of "a *right* previously held under state law." *Id.* at 708 (emphasis added). Thus, under *Paul*, injury to reputation can be

considered only if it is annexed to some other protected liberty or property interest under state law, such as the property interest in continued employment. Whether injury to reputation presents issues cognizable by the jury in the case at hand, therefore, depends on whether plaintiff can establish some other liberty or property interest to which such injury may be annexed.

Plaintiff has alleged a property interest in continued employment at Michigan State University. Although Dr. Hildebrand was nontenured, that fact alone does not preclude his claim. Where a faculty member has a "legitimate claim of entitlement" based on "mutually explicit understandings," a property right may arise. *Perry* v *Sindermann*, 408 U.S. 593, 601-02 (1972); *but see Bishop* v *Wood*, 96 S.Ct. 2074 (1976). Plaintiff testified that he was elected to the Advisory Committee and received an increase in salary, prompting him to anticipate that he would be retained. Plaintiff also testified, however, that he knew he was a "probationary employee," as the terms of his appointment clearly stated. Giving plaintiff every conceivable benefit of the doubt on the facts stated during his testimony, the only possible conclusion is that the understandings upon which plaintiff's claims to entitlement is predicated were unilateral rather than mutual. True, plaintiff anticipated retention by the University, but he was also aware that he was *probationary* and therefore had no "legitimate claim of entitlement" to his position. No issue of fact on this matter remained for the jury.

Plaintiff also alleges a property interest in the procedures prescribed in the departmental bylaws. Like the question of plaintiff's activity in seeking election to the Advisory

Committee, this question was decided by the jury. The following interrogatory was submitted:

> "The Social Science, University College, Departmental By-Laws, and appendix thereto (November 3, 1967) provides in pertinent part as follows (page 12):
>
> "IV. *Staff Evaluation*
>
> The staff evaluation practices currently in operation are as follows:
>
> . . . . . .
>
> *(2) At the time of reappointment*
>
> (a) Department chairmen confers with advisory committee and/or tenured staff.
>
> (b) The Dean and each non-tenured faculty member will confer at least once every two years. Department chairmen will confer with nontenured faculty at least once a year regarding the faculty members professional standing and prospects.
>
> (c) Recommends to the Dean.
>
> Was there compliance with the above stated procedure with reference to plaintiff, John R. Hildebrand?"

The jury answered "yes," and the Court concurs with this finding, rendering determination whether inherently equitable or inherently legal issues are involved unnecessary.

Consideration of the foregoing prompted the Court to conclude that the issues in this case were properly decided by the Court.[33] Therefore, the Court exercised its discretion under Federal Rule of Civil Procedure 39(a)(2), withdrawing certain issues from jury consideration but retaining the jury in an advisory capacity to assure full and careful consideration of plaintiff's claims.

VI. COMMENTS AND CONCLUSIONS

This case has provided the Court its first opportunity to work in detail with this difficult area. Numberous other courts, however, have preceded us in this endeavor,[34] and come of their comments are well worth consideration here. As the Eighth Circuit stated in *Cusumano* v *Ratchford*, *supra*:

> "It seems appropriate to express a caveat: We do not, obviously, hesitate to enter the burgeoning schoolteacher fray when constitutional issues are at stake. So much should be abundantly clear from the compendium cited in note 1, supra. But aside from such issues, the matters of the selection of teachers, their professional qualifications, and their retention are best (and, as a matter of law, properly) left to those entrusted by the state with the awesome responsibilities for the education of our young."
> (Footnote omitted). 507 F.2d at 987.

> "It would be intolerable for the courts to interject themselves and to require an educational institution to hire or to maintain on its staff a professor or instructor whom it deemed undesirable and did not wish to employ. For the courts to impose such a requirement would be an interference with the operation of institutions of higher learning contrary to established principles of law and to the best traditions of education."

Jones v *Hopper*, 410 F.2d 1323, 1329 (10th Cir. 1969).

In closing, we echo the feelings of the Second Circuit in *Faro* v *New York University*, 502 F.2d 1229 (2d Cir. 1974):

> "Of all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision. Dr. Faro would

remove any subjective judgments by her faculty colleagues in the decision-making process by having the courts examine 'the university's recruiment, compensation, promotion and termination and by analyzing the way these procedures are applied to the claimant personally' . . . This argument might well lend itself to a *reductio ad absurdum* rebuttal. Such a procedure, in effect, would require a faculty committee charged with recommending or withholding advancements or tenure appointments to subject itself to a court inquiry at the behest of unsuccessful and disgruntled candidates as to why the unsuccessful was not as well qualified as the successful."

502 F.2d at 1231.

Accordingly, because the Court finds that the plaintiff's requests for relief must be denied, IT IS THEREFORE ORDERED that judgment be entered in favor of defendants and against the plaintiff. IT IS FURTHER ORDERED that plaintiff's cause of action be and the same hereby is DISMISSED.

The foregoing constitutes the Court's findings of fact and conclusions of law as required by Rule 52 of the Federal Rules of Civil Procedure.

(s) Wendell A. Miles, *U. S. District Judge*

Dated: March 17, 1977

FOOTNOTES

[1] See Plaintiff's Exhibit 13. (Appendix).

[2] See Plaintiff's Exhibit 13 and also the "Policy Handbook for MSU Faculty," Plaintiff's Exhibit 14, p. 7.

[3] See generally Plaintiff's Exhibit 3.

[4] Plaintiff's Exhibit 16, p. 12.

[5] Minutes of this meeting are Plaintiff's Exhibit 19.

[6] See Plaintiff's Exhibit 20.

[7] See Plaintiff's Exhibit 21.

[8] Defendant's Exhibit D.

[9] Document 33.

[10] Document 87.

[11] In light of the fact that the parties were given advance notice of the Court's decision, we find no prohibition to the methodology used in this case. See Rule 39(a) and (c) and 5 Moore's Federal Practice, ¶ 29.10[1].

[12] The interrogatories to the jury, and their answers, are as follows:

Interrogatory No. 1

Should plaintiff, John R. Hildebrand be reinstated to the staff at Michigan State University.

(Yes-No) Yes

Signed: /s/ Dennis A. Merizon

Interrogatory No. 2

The Social Science, University College, Departmental By-Laws, and appendix thereto (November 3, 1967) provides in pertinent part as follows (page 12):

"IV. *Staff Evaluation*

The staff evaluation practices currently in operation are as follows:

. . . . . .

(2) *At the time of reappointment*

(a) Department chairmen confers with advisory committee and/or tenured staff.

(b) The Dean and each non-tenured faculty member will confer at least once every two years. Department chairmen will confer with non-tenured faculty at least once a year regarding the faculty members professional standing and prospects.

(c) Recommends to the Dean.

Was there compliance with the above stated procedures with reference to Plaintiff, John R. Hildebrand?

(Yes-No) Yes

Signed: /s/ Dennis A. Merizon
Foreperson

Interrogatory No. 3

Was plaintiff John R. Hildebrand entitled to reappointment at the conclusion of his two year probationary appointment?

(Yes-No) Yes

Signed: /s/ Dennis A. Merizon
Foreperson

Opinion of the United States District Court
for the Western District of Michigan
(Filed March 18, 1977)

Interrogatory No. 4

Did any of the defendants knowingly deprive plaintiff, John R. Hildebrand of reappointment at Michigan State University or knowingly deny him the type of hearing which he would otherwise be entitled to because of plaintiff's candidacy for Departmental Advisory Committee?

(Yes-No) No

Signed: /s/ Dennis A. Merizon
Foreperson

If the answer to the question is "yes," then insert the name or names of the persons you have determined to have done so.

_____

_____

_____

[13] See Plaintiff's Exhibit 25.

[14] See Complaint Count II, paragraph 2.

[15] This decision, of course, effectively determines the grant or denial of tenure, to one in Dr. Hildebrand's position.

[16] From the evidence, it is clear that the University and these defendants complied with all the other steps in the procedure. We also note that the procedure of Section IV(2) is tracked in Section IV(3):

"(3) *At time of tenure decision*

(a) Department chairman confers with Advisory Committee and/or tenured staff.

(b) Recommends to the Dean."

[17] Compare Plaintiff's exhibits 16 and 17.

[18] This Section of the Rules of Tenure reads:

"V. For purposes of application of these tenure rules:

C. A staff member who is not to be recommended for reappointment by his departmental head and Dean shall be so notified in writing by the departmental head by the December 15 preceding the expiration of his appointment, except as provision to the contrary is made at the time of appointment."

[19] We find no provision or requirement for such a meeting either in the Department By-Laws or in the University Rules of Tenure.

[20] The President of the University, an institution of upwards of 40,000 students, was present as witness for one day of trial.

[21] There was some initial uncertainty about this proposition in the Sixth Circuit. In *Lawton* v *Nightingale*, 345 F. Supp. 683 (N.D. Ohio 1972), the court held that a jury trial was not available in an action brought under 42 U.S.C. §1983 (1970). *See also McCraw* v *United Ass'n of Journeymen*, 341 F.2d 705 (6th Cir. 1965). The conclusion was premised on the assumption that statutorily created causes of action did not fall within the seventh amendment meaning of "common law." This assumption has been completely foreclosed by *Curtis* v *Loether*, 415 U.S. 189 (1974). Judge Young raises some interesting although perhaps debatable historical arguments in support of his conclusion that jury trials were unavailable in section 1983 actions. In *Amburgey* v *Cassidy*, 507 F.2d 729 (6th Cir. 1974), the Sixth Circuit rejected this conclusion, holding that both legal and equitable was available under section 1983, and that under some circumstances there was a right to a jury trial.

[22] In *Beacon Theatres, Inc.* v *Westover*, 359 U.S. 500 (1959), the Court was concerned with the order of disposition of legal and equitable issues arising from the same set of facts. Formerly, the trial court was given broad discretion regarding the sequence of trial of coexisting legal and equitable claims. The Court in *Beacon Theatres*, however, concluded that prior disposition of the case on equitable grounds unduly impaired the right to a jury trial. The Court noted that the basis for the practice of disposing of the equitable issues first was the necessity for unitary disposition of the action—available only at equity. However, the liberal joinder of claims provisions of the Federal Rules of Civil Procedures eliminated this necessity.

Commentators initially interpreted *Beacon Theatres* somewhat narrowly, seizing on the fact that the equitable claim involved there was an extremely weak one. As a result, *Beacon Theatres* was considered to call for an analysis of the basic nature of the *whole case*. In *Dairy Queen* v *Wood*, 369 U.S. 469 (1962), the Supreme Court made it clear that the governing consideration was the basic nature of *each issue*.

The determination in many instances is somewhat difficult, and the difficulty is aggravated by the abolition of the old distinction between law and equity. One commentator has suggested, however, that if the court is to err on the jury trial issue, it is better to err in favor of the jury trial than against it. He noted that where a suit in equity is erroneously tried at law, the error may well be harmless, and that even if the error proves prejudicial, the case may be remanded for findings of fact by the presiding judge without the necessity for representation of the evidence. *The Supreme Court, 1958 Term*, 73 Harv. L. Rev. 128, 191 (1959). *See also Burt* v *Board of Trustees*, 521 F.2d 1201, 1206 (5th Cir. 1975).

[23] As Justice Stewart noted in dissent in *Ross* v *Bernhard*, 396 U.S. 531, 550 (1970):

> The fact is, of course, that there are . . . no such things as inherently "legal issues" or inherently "equitable issues." There are

only factual issues, and "like chameleon [they] take their color from surrounding circumstances."

The single most distinguishing characteristic of an equitable issue is, of course, the relief sought. Even this basis of distinction, however, raises difficult problems in discriminating between equitable and legal relief. The Federal Rules of Civil Procedure purport to abolish the distinction between law and equity, but that distinction has been resurrected in determining whether jury trial is appropriate. At common law the question whether the relief sought was equitable or legal was a simple one—if the suit was before a court of equity, equitable relief was sought, while if it was before a court of law, legal relief was sought. The Federal Rules have deprived courts of such a simple solution.

[24] This criteria is most readily applicable to situations of great complexity where an action for an accounting would have been appropriate in equity.

[25] Although this criteria was initially strongly emphasized, its importance seems to have declined of late. One commentator expressed relief that courts were no longer compelled to sift through tomes of history seeking "the reek of the museum." *Curtis* v *Loether*, 415 U.S. 189 (1974), manifests this shift in emphasis at the Supreme Court level.

[26] The factual issues raised by these considerations can be summarized as follows:

I. Did plaintiff's election to the Advisory Committee prompt the decision not to renew his contract in violation of his first amendment rights?

II. Did plaintiff's criticism and discussion of departmental conditions prompt the decision not to renew his contract in violation of his first amendment rights?

A. Did plaintiff make these statements or engage in these discussions?

B. Did the department members making the decision whether to renew plaintiff's contract know of these statements or discussions?

C. Was the decision prompted by this knowledge?

III. Was plaintiff accorded due process of law in the decision not to renew his contract?

A. Was Plaintiff entitled to due process?

1. Was plaintiff deprived of a liberty interest?

a. Was the decision prompted by plaintiff's exercise of his first amendment rights? (See I & II supra).

b. Does the decision stigmatize plaintiff or affect his reputation and good name?

2. Was plaintiff deprived of a property interest?

a. Was there a legitimate expectation continued employment even in the absence of tenure?

b. Was there a legitimate expectation that the procedures set forth in the departmental bylaws would be followed?

(1) Were the procedures part of the bylaws?
(2) Was there nevertheless a legitimate expectation that they would be followed?

B. Was there a deprivation of due process?
1. Did the procedures followed afford plaintiff due process?
2. Were the departmental bylaws followed?

Further issues are raised by the claims for damages:

Did the deprivation of constitutional rights leads to:

1. a right to reinstatement?
2. a right to back pay?
3. a right to compensatory damages for
   a. injury to reputation?
   b. injury to future earning capacity?
   c. embarrassment and hurt feelings?
   d. deprivation of a self-fulfilling occupation?
4. a right to punitive damages?

The basic inquiry here is whether the constitutional violation caused the injury to be remedied and whether the remedy sought is appropriate to the injury.

[27] Reinstatement and back pay have uniformly been held to be equitable remedies. In Title VII cases, courts have reasoned that back pay is an equitable remedy because Title VII provides *only* equitable remedies. Back pay, under the better view, is an inherently equitable remedy, in whatever context it is employed, in the nature of restitution of employment wrongully withheld. See *EEOC* v *Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3214 (U.S. Oct. 7, 1975).

[28] Some language in *Goss* v *Lopez*, 95 S.Ct. 729, 737 (1975), raises an interesting question of standing. There, the Court intimates that a *de minimus* deprivation is not cognizable under the due process clause. It is not clear whether the Court's comment refers to the deprivation necessary to state a cause of action under the due process clause, or whether it refers to the amount of injury necessary to have any claim heard by an Article III court. The standing test propounded by the Court in *Association of Data Processing Serv. Org., Inc.* v *Camp*, 397 U.S. 150, 152 (1970), contains the requirement of "injury in fact." An injury of greater magnitude than "*de minimus*" may be necessary to establish injury in fact. This court is not prepared to say whether plaintiff's "embarrassment" and "hurt feelings" fall under the maxim "de minimus non curat lex," but due consideration should be given to whether injuries of this nature, in the absence of extenuating circumstances, should be compensable in a court of law.

[29] Plaintiff's family had certain ties in East Lansing making plaintiff reluctant to seek a position elsewhere. His wife was a Michigan State

faculty member, his son was in a local high school, and his daughter was attending college.

[30] See interrogatory number 4, supra.

[31] See note 26 supra.

[32] One of the criteria for determining whether a jury trial is appropriate is whether the issues are so complex that they cannot be determined by a jury. This criteria envisions a situation where an accounting in equity would have been appropriate. The issues in this case, while complex and presenting numerous pitfalls for the jury, are not so complex as to be completely beyond their comprehension. See note 26, supra.

[33] In the recent case of *Burt* v *Board of Trustees*, 521 F.2d 1201 (5th Cir. 1975), the Fifth Circuit considered the right to a jury trial in a 1983 action brought by a discharged school teacher seeking damages, reinstatement, and back pay. The case troubled the Fifth Circuit, which concluded that all issues common to the claim for damages and the claim for equitable relief should be decided by the jury. While conceding the correctness of the result in *Burt*, the circumstances are substantially different in the case at bar. The issues were not as complex, as numerous, or as interrelated in *Burt* as they are here. Furthermore, plaintiff *Burt* apparently convinced the court that there was a sufficient factual basis for her allegations for legal relief to create a question for the jury. Finally, an advisory jury was not employed in *Burt*, and the plaintiff there was completely foreclosed from having his claims considered by a jury.

[34] For a partial compendium of these cases, see *Frazier* v *Curators of the University of Missouri*, 495 F.2d 1149 n. 1 (8th Cir. 1974).

Opinion of the United States District Court
for the Western District of Michigan
(Filed March 18, 1977)

APPENDIX

(Opinion of the United States District Court for the Western District of Michigan, file no. G285-71 CA 5, filed March 13, 1977)

Opinion of the United States District Court
for the Western District of Michigan
(Filed March 18, 1977)

MICHIGAN STATE UNIVERSITY
East Lansing, Michigan 48823
University College
Department of Social Science
Bessey Hall

September 12, 1968

John Hildebrand
Associate Professor
Department of Social Science
Bessey Hall

Dear Dr. Hildebrand:

As you will recall from our conversation last June 4, 1968 at the time when I was interviewing all non-tenured faculty in the department (as required by University College Faculty By-Laws), I raised the question of tenure with you and I pointed out the many considerations which go into a tenure decision. The terms of your appointment as Associate Professor require that this decision be reached and made known to you at least nine months prior to termination date of your appointment period (August 31, 1969).

With the full knowledge of the departmental Advisory Committee (as you will also recall) I had earlier indicated that I would confer with the full professors of the department concerning personnel decisions. I held such a meeting with those persons holding professorial rank and who were available on July 2, 1968.*

After extensive discussion with this group the full professors unanimously voted to recommend to the department chairman that tenure not be accorded to you at the conclusion of your current appointment period.

Following the receipt of this recommendation, the department chairman discussed the proposed action with

the Dean of the College and the recommendation of the full professors not to accord tenure to you was accepted.

Should you care to review this action with me, I will be pleased to discuss the various considerations which are involved.

Sincerely yours,

(s) DOUGLAS DUNHAM
Chairman

*Professors present: Segal, Klein, Snyder, Vener, Epstein, Hall, Come, Najjar, Nosow, Levak

Professors absent: Blum (on leave), Smucker, Haak, S. Parker, Battistini

Opinion of the United States District Court
for the Western District of Michigan
(Filed March 18, 1977)

MICHIGAN STATE UNIVERSITY
East Lansing

Date April 26, 1967

To John R. Hildebrand
From Jack Breslin, *Secretary*

The Board of Trustees at its meeting April 20 approved your appointment as Associate Professor of Social Science and the Latin American Studies Center at a salary of $12,500 per year on a 10-month basis effective September 1, 1967.

RULES OF TENURE
AT MICHIGAN STATE UNIVERSITY
AS APPROVED MAY 15, 1952

The Board in approving this statement of tenure policy does so in good faith with the intent to comply fully with it. It must, however, reserve the right to deviate from these terms if conditions beyond its control, such as abrupt declines in enrollment, drastic loss of income or conditions that result in the drastic curtailment or abandonment of programs or activities, make it necessary to do so.

Preamble: The purpose of tenure is to assure the university staff academic freedom and security and to protect the best interests of the university. Tenure shall not be considered to protect any person from the loss of his position as a result of incompetence, moral turpitude, voluntary withdrawal or actions which are inimical to the interests of the university.

I. Instructor

An instructor shall be appointed initially for a 2-year term. This appointment may be followed by a second 2-year term and an additional term of three years, after which an

instructor not promoted to the rank of assistant professor may not be reappointed, except one working toward an advanced degree or having other special problems for whom additional one-year appointments may be made upon the approval of the President and the standing Faculty Committee on Tenure.

II. Assistant Professor

A. The initial appointment to the rank of assistant professor for a person who has served as instructor at Michigan State University for three years or more shall be for a term of three years. If reappointed, he shall have tenure.

B. The initial appointment to the rank of assistant professor for a person who has served as instructor in this institution for one year shall be for two years, and for a person who has served as instructor for two years shall be for one year. He may be appointed for an additional term of three years. If reappointed for a third term at this rank, he shall have tenure.

C The initial appointment to the rank of assistant professor for a person who has not served previously at Michigan State University shall be for three years. He may be appointed for a second term of three years. If reappointed for a third term, he shall have tenure.

Opinion of the United States District Court
for the Western District of Michigan
(Filed March 18, 1977)

MICHIGAN STATE UNIVERSITY
APPOINTMENT RECOMMENDATION

TO THE PRESIDENT AND BOARD OF TRUSTEES:

Date March 24, 1967

Name John R. Hildebrand
Address 2806 22nd St., Lubbock, Texas
Position Number 18 10-month basis
Title Associate Professor
Department(s) Social Science and Latin American Studies Center, University College
Proposed salary rate: $12,500 per year
Term of Appointment: From September 1, 1967 through -

TRAINING, EXPERIENCE, AND PERSONAL DATA

Previous University Experience (Institution, Position, Years): 1954-55, Instructor, Oklahoma State University; 1955-196 Assistant Prof, Kansas State University; 1962-present, Professor, Texas Technological College.

Other relevant experience: Economist AID, Buenos Aires; 1962; Economist AID Guatemala 1960-62.

Degrees earned:

A.D.; Univ. California, Berkeley, 1949
M.A.; George Washington University, 1951
Ph.D.; University of Chicago, 1959

Date of birth: April 21, 1924
United States Citizen: Yes
Has candidate pased the health examination? Notified
Sex: Male, Married

X NEW APPOINTMENT

With tenure: No Subject to tenure rules: Yes
X Full time

Dual appointment information: Department name Latin American Studies Center

Comments: Title affiliation only with Latin American Studies Center

Salary Distribution: University General 100% Account Number 11-2671 Acct. Name Soc. Sci Payroll

RECOMMENDED BY:

Department Head or Director
(s) Douglas Dunham, March 24, 1967

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

JOHN R. HILDEBRAND,
Plaintiff,

vs. No. G 285-71 CA

BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY; et al.,
Defendants.

JURY VERDICT

JURY VERDICT FORM I

COUNT I (First Amendment).

1. We, the jury, find in favor of the plaintiff and against one or more of the defendants. (Activity protected by first amendment was substantial or motivating factor in non-reappointment and plaintiff would have been reappointed if the First Amendment activity had not occurred).

Signed: PAUL J. SMITH
Foreperson

2. We, the jury, find for the defendants and against the plaintiff. (Activity protected by First Amendment was not a substantial or motivating factor in non-reappointment, or plaintiff would not have been reappointed even in the absence of First Amendment conduct).

Dated: 1-5-80

If you have found for the plaintiff (1.) and against one or more defendants, you will answer the following

interrogatories. and then you will proceed to Verdict Form II. (Count II)

If you have found for the defendants and against the plaintiff, your verdict is complete and you will proceed to Verdict Form II (Count II) on page 4.

A. INTERROGATORIES FOR COUNT I.

1. Were the following actions or events protected by the First Amendment to the United States Constitution?

(a) Plaintiff's criticism of conditions within the department of Social Science? Yes

(b) Plaintiff's candidacy for the departmental advisory committee? Yes

(c) Plaintiff's election to the departmental advisory committee in the May 23, 1968 election? Yes

2. Were the following actions or events a substantial or motivating factor in the decision that the plaintiff, John R. Hildebrand not be reappointed:

(a) Plaintiff's criticism of conditions within the department of Social Science. Yes

(b) Plaintiff's candidacy for the departmental advisory committee. No

(c) The outcome of the May 23, 1968 election. Yes

3. (a) If you answered 2(a) above "yes," then answer the following interrogatory: Do you find that plaintiff would have been terminated even if he had not criticized the conditions within his department? No

(b) If you answered 2(b) above "Yes," then answer the following interrogatory: Do you find that plaintiff would have been terminated even if he had not been a candidate for the departmental advisory committee?

(c) If you answered 2(c) above "Yes," then answer the following interrogatory: Do you find that plaintiff would have been terminated even if the outcome of the May 23, 1968 election had been different? No

4. If the following defendants' acts or conduct was substantially motivated by retaliation against the plaintiff for the exercise of first amendment rights, would such defendant have acted to deny reappointment to the plaintiff even in the absence of his first amendment activities?

Dr. Clifton R. Wharton - No
Dr. John E. Cantlon - No
Dr. Edward A. Carlin - No
Dr. Douglas Dunham - No
Dr. Clinton A. Snyder - No

5. Were the defendants who determined that plaintiff should not be reappointed at Michigan State University acting under color of state law? Yes

6. With respect to the following defendants do you find either that he knew or reasonably should have known that his actions would violate the constitutional rights of the plaintiff, or that he acted with a malicious intention to cause a deprivation of plaintiff's constitutional rights?

Dr. Clinton R. Wharton - No
Dr. John E. Cantlon - No
Dr. Edward A. Carlin - No
Dr. Douglas Dunham - Yes
Dr. Clinton A. Snyder - Yes

7. Have you found that two or more of the following defendants entered into a conspiracy to deprive the plaintiff of his First Amendment Rights? If so, indicate the members of that conspiracy by placing an (x) next to such defendant's name.

Dr. Clinton R. Wharton -
Dr. John E. Cantlon -
Dr. Edward A. Carlin -
Dr. Douglas Dunham -
Dr. Clinton A. Snyder -

8. With respect to each of the following defendants, were that defendant's acts and conduct the proximate cause of injury and consequent damage to the plaintiff?

Dr. Clinton R. Wharton - No
Dr. John E. Cantlon - No
Dr. Edward A. Carlin - No
Dr. Douglas Dunham - Yes
Dr. Clinton A. Snyder - Yes

9. Has the plaintiff shown by a preponderance of the evidence that he is entitled to reinstatement at Michigan State University? Yes

JURY VERDICT FORM II
COUNT II. (Due Process)

1. We, the jury, find in favor of the plaintiff and against one or more of the defendants.

2. We, the jury, find for the defendants and against the plaintiff.

Signed: PAUL J. SMITH
Foreperson

Dated: January 5, 1980.

If you have found for the plaintiff (1.) and against one or more defendants, you will answer the following interrogatories, and then proceed to Jury Verdict Form III. If you have found for the defendants and against the plaintiff, your verdict is complete as to Count II. (If you

have found for the plaintiff in Jury Verdict Form I, you will proceed to Verdict Form III.)

JURY VERDICT FORM III - Relief

1. Should plaintiff be awarded back pay? Yes

If you answered the above question "yes" then complete the following compilation for back pay.

School Year	Amount Plaintiff would have earned at Michigan State University		Amount Plaintiff should have earned elsewhere	Back Pay
1969-1970	$ 13,850.00	less	$0	= $ 13,850.00
1970-1971	$ 19,785.00	less	$0	= $ 19,785.00
1971-1972	$ 21,824.00	less	$0	= $ 21,824.00
1972-1973	$ 22,643.00	less	$0	= $ 22,643.00
1973-1974	$ 23,672.00	less	$0	= $ 23,672.00
1974-1975	$ 25,195.00	less	$0	= $ 25,195.00
1975-1976	$ 25,617.00	less	$0	= $ 25,617.00
1976-1977	$ 27,970.00	less	$0	= $ 27,970.00
1977-1978	$ 28,622.00	less	$0	= $ 28,622.00
1978-1979	$ 29,949.00	less	$0	= $ 29,949.00
1979-1980 (part)	$ 10,165.00	less	$0	= $ 10,165.00
TOTALS	$249,292.00		$0	$249,929.00

2. If plaintiff is entitled to other compensatory or nominal damages, specify the amount. $100.00.

3. As to each of the following defendants, indicate whether or not he is responsible for compensatory or nominal damages:

Clinton R. Wharton - No
John Edward Cantlon - No
Edward A. Carlin - No
Douglas Dunham - Yes
Clinton A. Snyder - Yes

Jury Verdict

4. If you have found any of the following defendants responsible for compensatory or nominal damages, then as to such defendant(s) indicate the amount of punitive damages, if any, to be awarded against that defendant:

Douglas Dunham - $50.00
Clinton A. Snyder - $50.00

Plaintiff's Exhibit 14

PLAINTIFF'S EXHIBIT 14

Tenure Action and Promotion

Recommendations for actions under the tenure system and for promotions in rank are made in the department and reviewed successively by the dean, the Provost and the President who make the final recommendation to the Board of Trustees for action. Since extensive information is needed to make an adequate evaluation of the productivity of each faculty member to be recommended for reappointment, tenure, or promotion, a comprehensive form has been developed which provides space for reporting activities; viz., instruction—undergraduate, graduate, academic advising; research—creative and scholarly; public services—extension and/or continuing education; international program assignments—committee and administrative services; and other evidence of merit. No one person is required or expected to become involved in every activity. Sample copies of the form are available in the Provost's Office.

Information for tenure system actions is gathered in the early part of fall term for final action by the Board of Trustees in November so that the December 15 deadline specified in the tenure regulations can be met.

Information for promotions is collected early in the winter term for final action by the Board of Trustees in its March or April meeting.

Plaintiff's Exhibit 28

PLAINTIFF'S EXHIBIT 28

AMERICAN ASSOCIATION
OF UNIVERSITY PROFESSORS
Michigan State University Chapter
East Lansing, Michigan

February 19, 1969

Professor Douglas Dunham
Chairman, Department of
Social Science
University College
Michigan State University
East Lansing, Michigan

Dear Professor Dunham:

On behalf of Professor Harrington and myself, I would like to thank you for your courtesy on the occasion of our recent meeting with you concerning Dr. John Hildebrand, Associate Professor of Social Science. We appreciate the courteous and candid discussions of the reasons for the action of your department in not renewing Dr. Hildebrand's appointment. We believe that your department has operated in a way which would, in part, satisfy the prodedural rules. In Dr. Hildebrand's case your department committee did not have the associate professors with tenure serve with your senior *professors as called for by your department's regulations in this matter*. As you have pointed out, there are only two associate professors with tenure in your department, one of whom was abroad at the time the Hildebrand tenure decision was made.

During the course of our conversation, we found substantial agreement with you on the following procedural rules which should prevail in tenure decisions as follows:

1. Judgments on the granting of tenure to non-tenured faculty members should be made by a duly

constituted representative body of the faculty members of the department concerned, including, of course, the department chairman who has the final responsibility at the department level for the tenure decision.

2. The principles of tenure should be preserved; that is to say that the criteria for non-tenured faculty must be less rigid than in the dismissal of tenured faculty members.

3. That a decision in the case of a non-tenured faculty member should not be arbitrary, capricious, or discriminatory; that is to say that it should rest on standards of professional performance applied consistently in similar cases.

In discussing the Hildebrand decision with you, it was our conclusion that the requirements of items one and two above, were satisfactorily met, but we have serious doubt on the basis of your account that the *requirements of rule three were satisfied.* The core purpose of any set of procedural rules in tenure cases, we believe, is to assure, in so far as it is possible for men of integrity and reason to do so, that substantial due process by afforded the faculty member whose tenure is being judged. The essence of substantial due process is that:

(a) A decision by made on the basis of a serious attempt to obtain relevant evidence;

(b) That the person being evaluated be given a full opportunity to present evidence in his own behalf and to rebut evidence presented against him, directly to all those who are judging him;

(c) That those who evaluate this evidence are competent and authorized to do so;

(d) That the decision be made after and only after all the evidence has been presented. At the departmental level this requires that only those who have analyzed and evaluated the evidence be permitted to render a decision.

We believe that you did agree with us that only if these procedures were followed could one be satisfied that substantial due process has been afforded, and that only in this way could one minimize the danger of an arbitrary, capricious or discriminatory decision on tenure matters.

It is clear from your account of the manner in which the decision was made in Dr. Hildebrand's case, (which also checks with Dr. Hildebrand's account) that none of the above requirements were met. Most important, Dr. Hildebrand was not given an opportunity to present evidence on his own behalf, nor to rebut evidence against him before a decision was reached by your senior faculty. Indeed, it is hard to see how he could have done so unless clear and tangible reasons for his non-renewal were reduced to writing and presented to him in adequate time to allow a defense to be prepared. Even after the decision was made, you have refused his request to state in written form the reasons for the adverse decision. You have also refused our request that you give him such reasons in writing.

It is not the AAUP position that the burden of proof in the case of non-tenured faculty seeking tenure be placed upon the Department. It properly falls upon the non-tenured faculty member to show why he should be given tenure. But he cannot do this without being given the opportunity to present his case *before* the decision has been reached, directly and personally to those who render judgment, and he cannot do this without being allowed to rebut any detrimental allegations and evidence.

So far as the substantive reasons you gave to us are concerned, we are candid to state that they appear either

vague, or, where clear, are directly contradicted by Dr. Hildebrand. Briefly, these, as we understood them, are:

(1) Dr. Hildebrand does not "fit" well into a Department of Social Science. Why he does not "fit" well is unclear. In part, it may be that your colleagues believe that a competent economist with special interest in development problems of Latin America is not suited to each Social Science, if this is one of the reasons. Dr. Hildebrand's professional training and his experience as a member of the Kansas Legislature would seem to us to fall within Social Science.

(2) It was alleged that Dr. Hildebrand did not carry his load in the construction of final examinations. This Dr. Hildebrand flatly denies.

(3) It was alleged that he was indifferent to and did not cooperate in the design of new courses and improvement of existing courses. This Dr. Hildebrand denies.

As for his teaching and research and publication records, you stated that he was seriously interested in the former, and that you believed him now to be an adequate instructor. You found no fault with his publication and research performance. As for Dr. Hildebrand's concern for the Department, we note that he was elected by his colleagues to the Department's Advisory Committee, and that he serves on that Committee.

We cite these arguments with no disposition to judge them—but only to emphasize that no opportunity was given Dr. Hildebrand to rebut them *before* a decision was made, nor was he ever aware that there existed serious doubt on the part of his senior colleagues because of these reasons—whatever other reasons they may privately or collectively hold. Though Dr. Hildebrand's case was

reconsidered by your senior faculty, this reconsideration afforded Dr. Hildebrand no opportunity to rebut, nor was tangible evidence brought forth for him to reply to.

In view of these circumstances, we regretfully conclude that Dr. Hildebrand was not given substantial due process. We, therefore, intend to press for reconsideration of his case to the appropriate University bodies.

Sincerely,

For the Council of the AAUP
(s) ALBERT RABIN, *President*
James Harrington, *Vice President*
Harold Wein, *Chairman*, Academic Freedom Committee

Plaintiff's Exhibit 66

PLAINTIFF'S EXHIBIT 66

MICHIGAN STATE UNIVERSITY

Date September 11, 1968

RECOMMENDATION FORM FOR TENURE ACTION

Name Hildebrand John
Present Rank Assoc. Prof.
Date of Birth 4-21-24
U.S. Citizen? Yes;
Department(s) Social Science
College(s) University

Summary Information

1. Years of full time MSU faculty service to next Sept. 1: Assoc. Prof. 2

2. Tot. Yrs. full time faculty experience (MSU & Other) 12; Present Salary $13,000 10 or 12 mo. 10

3. Highest degree Ph.D. Institution University of Chicago Date 1959

4. Ratings by Department Chairman relative to most appropriate staff comparison groups:*

Function	% of Time	Very Superior	Superior	Average	Below Average
Instruction:					
Undergraduate					D
Graduate					
Academic Advising					
Research, Creative & Scholarly			D		
Public Services:					
Extension &/or Continuing Educ.				D	
International Prog. Assignments				D	
Other					
Committees & Administrative Services					D
Other					
Overall Value (Total)				D	

* Indicate ratings by placing one or more letters under appropriate adjectives for each function as follows: All U.S. Universities, N; M.S.U., U; Department, D.

Plaintiff's Exhibit 66

5. Recommendation and summary statement by Department Chairman:

Upon the unanimous recommendation of the full professors of the department and with the concurrence of the department chairman, it is hereby recommended that tenure *not* be granted to Associate Professor Hildebrand. He seems somewhat misplaced in our king of program though no doubt he could be quite successful in a more traditionally oriented single discipline program, or in a Latin American Studies center.

I concur in the recommendation of the Department Chairman and the other full professors of the Department of Social Science that Dr. Hildebrand *not be reappointed*. Attached letter from Dr. Dunham details the procedures undergirding this decision.

6. Recommendation and Comment by Dean:

SIGNATURES:

(s) DOUGLAS DUNHAM
Department Chairman
(s) EDWARD A. CARLIN
Dean

Plaintiff's Exhibit 66

Name John Hildebrand

Date September 11, 1968

INSTRUCTION:

1. Record of teaching load for the past six terms (excluding summer term)

Term and Year	Course Number	Credits (Number or 'Var.')	Number of Sections Taught *			Number of Students	Number of Graduate Assistants Supervised	Comments or Not
			Lec.	Rec.	Lab.			
Fall 1967	SS 232	4		3		165		
Winter 1968	SS 232	4		3		156		
Spring 1968	SS 232	4		3		159		

* Include only sections involving actual participation

Comments and notes:

2. Summarize available evidence of effectiveness in teaching (summary of recently used rating scales; statements by colleagues who have visited classes, shared instruction, or reviewed examinations). Attach additional sheets if needed.

Plaintiff's Exhibit 66

While Mr. Hildebrand does an "adequate" job, his heart is not really in this kind of program. Students have complained that he spends too much time relating his own personal political experiences as a former state legislator in Kansas. His orientation is primarily discipline oriented rather than interdisciplinary. He would be better suited for a straight economics department or a position where instructional duties are secondary to research activities or where he offers specialized courses in the areas of his demonstrated competence—Latin American economic development.

3. Summarize special contributions to course and curriculum development, experimentation with new methods, materials, etc.

Name John Hildebrand

Date September 11, 1968

ACADEMIC ADVISING

1. Number of undergraduate advisees (currently enrolled or active):

   Freshmen -
   Sophomores -
   Juniors -
   Seniors -

2. Number of graduate students (principal adviser or committee chairman):

	Masters	Doctors
Currently enrolled or active	—	—
Degrees Awarded - last five years	—	—

3. Number of doctoral committes last five years, exclusive of above: -

Plaintiff's Exhibit 66

4. Other "advising" services, such as service at registration desk, department scheduling officer, summer counseling clinics, etc.:

5. Evidence of quality or special contributions in academic advising:

6. Service as adviser of student groups and clubs (academic) and of student social organizations:

   Faculty adviser to MSU Conference on Inter American student projects.

Name John Hildebrand

Date September 11, 1968

RESEARCH, CREATIVE AND SCHOLARLY ACTIVITIES

1. Attach separate list of complete citations of publications, papers, and other creative works under headings of (1) Books (cite reviewers, if any), (2) Bulletins or Monographs, (3) Articles, (4) Reviews or Abstracts, (5) Papers read, and (6) Other creative works.

2. Summarize as follows:

	Books	Bulletins	Articles	Reviews	Papers	Others
Number in past 5 years	____	____	10	____	2	____
Total Number			10		2	

3. Other evidence of research, creative, and scholarly productivity:

4. Evaluation of the one or two most significant publications, papers, or other creative works in terms of originality and importance:

   His work on agrarian reform in selected Latin American countries apparently has been a worthwhile contribution.

Plaintiff's Exhibit 66

5. Contacts with learned societies for past five years:

Name of Society	Office & Committee Assignments	Meetings Attended (Year)	Check if on Program
Am. Econ. Association		1967	
American Farm Economic Association		1967	
Midwest Council of Latin American Studies		1967	
Southwest Conference of Latin American Studies		1968	X

John Hildebrand

September 11, 1968

"Some Difficulties with Empirical Results From Whole-Farm Cobb-Douglas-Type Production Functions," Journal of Farm Economics, 42, 4 (November, 1960); 897-904.

"Latin American Economic Development, Land Reform, and U.S. Aid with Special Reference to Guatemala," Journal of Inter-American Studies, 4, 3 (July, 1962): 351-361.

The Beef Grass-Grain Economy in the Pampas, a special report to Comision Nacional De Administracion Del Fondo Da Apoyo Al Desarrollo Economico and to U.S. Agency for International Development/Argentina, (1962). 72 pp. (with Wylie D. Goodsell and James R. Gray).

"Farm Size and Agrarian Reform in Guatemala," journal of *Inter-American Economic Affairs*, 16, 2 (Autumn 1962); 51-57.

"Guatemalan Rural Development Program: An Economist's Recommendations," journal of *Inter-American Economic Affairs*, 17, 1 (Summer 1963): 59-71.

"Evaluating Conservation Measures," *The Southwestern Social Science Quarterly* 44 (September, 1963); 171-173.

Plaintiff's Exhibit 66

"Surplus Farmers and Economic Development," *Proceedings, Agricultural Economics Section*, The Southwestern Social Science Association, *Annual Meeting* (March, 1964): 1-14.

"Texas Views the Common Market," *The Texas Techsan*, 15, 6 (October, 1964): 12-13.

"Guatemalan Colonization Projects: Institution Building and Resource Allocation," journal of *Inter-American Economic Affairs*, 19, 4 (Spring, 1966): 41-51.

"Value Judgments, Agrarian Reform, and Economic Development," Southwest Conference of Latin American Studies, Ft. Worth, Texas, February, 1968.

"Lafta and Paraguay: Economic and Social Development," Conference on the Economic Integration of Latin America, Palo Alto, California, May, 1958, and also served as a discussant on another paper.

"Comments on Manuscripts by Labarge, Arbena, and Gonzales," *West Georgia College Studies in the Social Sciences*, 6, 1 (June, 1967): 54-56.

"The Central American Common Market: Economic and Political Integration," Journal of Inter-American Studies, 9, 3 (July, 1967): 383-395. Also appears in condensed form in *Contemporary Latin America*, edited by Harvey L. Johnson and Richard V. Weekes, and published by the Office of International Affairs, University of Houston, Houston, Texas, 1968: 7-10.

"Value Judgments, Agrarian Reform, and Economic Development," accepted for publication in the proceedings of the Southwest Conference of Latin American Studies.

Plaintiff's Exhibit 66

Name John Hildebrand

Date September 11, 1968

COMMITTEE AND ADMINISTRATIVE SERVICES:
Indicate significant committee and administrative responsibilities and contributions.

Departmental Examination Committee

Ad Hoc Committee on Tracks

Mr. Hildebrand performed at a minimum level on these assignments which are significant acitivities directly related to the efficacy of our program. His apparent failure to really involve himself in our program or to develop a sense of indentification with its objectives seemed manifest by his reluctance to participate fully and at times to be openly irritated by requests for his time and energies involving a group task.

Name John Hildebrand

Date September 11, 1968

PUBLIC SERVICES
Extension and/or Continuing Education: List most significant contributions in such areas as leadership, program development, and the use of extension or conference techniques.

International Extension lecture on Guatemala" Delta Community College, March 1968.

International Extension lecture on "Economic Development" Muskegon Community College, April 1968.

International Program Assignments: Summarize most significant contributions to international programs, on and off campus and overseas.

Plaintiff's Exhibit 66

Affiliation with Latin American Studies Center, M.S.U. by title—was active in several of their staff discussions.

Other Public Services: Give specific evidence of accomplishment in such areas as consultation with individuals, business, industry, government, or other educational institutions, professional appearances before lay groups, and professional radio and television appearances. Limit to past five years.

Participant in a seminar U.S. Agency for International Development Washington, D.C., September 1967

Consultant AID, Paraguay 1967

OTHER FUNCTIONS (noted in summary on page 1)
Cite pertinent evidence of merit:

Other evidence of merit:

1. Scholarships, fellowships, and grants:

Dates	Source or Type	Nature of Accomplishments

2. Other distinctive awards, accomplishments of sabbatical or other leaves, and other evidence not covered above.

Plaintiff's Exhibit 66

MICHIGAN STATE UNIVERSITY
East Lansing, Michigan 48823
University College
Department of Social Science
Bessey Hall

September 24, 1968

Edward A. Carlin,
Dean
University College

Dear Dean Carlin:

The full professors of the Department of Social Science held a meeting September 23, 1968 at the request of Dr. John R. Hildebrand to hear his position and to respond to questions or comments concerning the earlier recommendation not to grant Dr. Hildebrand tenure at the conclusion of his current appointment period.

The meeting lasted over two and a half hours and after excusing Mr. Hildebrand at the conclusion of his remarks, the full professors discussed the issue at length.

With one professor abstaining but concurring with the subsequent actions, the full professors unanimously reaffirmed their original recommendation not to grant tenure to Mr. Hildebrand.

Sincerely yours,

(s) DOUGLAS DUNHAM
Chairman

DD/m

Professors Present: S. Parker, Segal, Snyder, Lovak, Smucker, Battistini, Haak, Hall, Come, Nosow, Najjar, Vener

Professors Absent: Blum, Klein, Epstein

Plaintiff's Exhibit 66

MICHIGAN STATE UNIVERSITY
East Lansing, Michigan 48823
University College
Department of Social Science
Bessey Hall

September 12, 1968

John Hildebrand
Associate Professor
Department of Social Science
Bessey Hall

Dear Dr. Hildebrand:

As you will recall from our conversation last June 4, 1968 at the time when I was interviewing all non-tenured faculty in the department (as required by University College Faculty By-Laws), I raised the question of tenure with you and I pointed out the many considerations which go into a tenure decision. The terms of your appointment as Associate Professor require that this decision be reached and made known to you at least nine months prior to termination date of your appointment period (August 31, 1969).

With the full knowledge of the departmental Advisory Committee (as you will also recall) I had earlier indicated that I would confer with the full professors of the department concerning personnel decisions. I held such a meeting with those persons holding professorial rank and who were available on July 2, 1968.*

After extensive discussion with this group the full professors unanimously voted to recommend to the department chairman that tenure not be accorded to you at the conclusion of your current appointment period.

Following the receipt of this recommendation, the department chairman discussed the proposed action with the Dean of the College and the recommendation of the full professors not to accord tenure to you was accepted.

Plaintiff's Exhibit 66

Should you care to review this action with me, I will be pleased to discuss the various considerations which are involved.

Sincerely yours,

Douglas Dunham
Chairman

*Professors present: Segal, Klein, Snyder, Vener, Epstein, Hall, Come, Najjar, Nosow, Lovak

Professors absent: Blum (on leave), Smucker, Haak, S. Parker, Battistini

Opposition

Office - Supreme Court, U.S.
FILED
MAR 10 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1517

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

JOHN R. HILDEBRAND,
Petitioner,

-VS-

BD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY; CLIFTON R. WHARTON, PRESIDENT, MICHIGAN STATE UNIVERSITY; JOHN EDWARD CANTLON, PROVOST, MICHIGAN STATE UNIVERSITY; EDWARD A. CARLIN, DEAN OF UNIVERSITY COLLEGE, MICHIGAN STATE UNIVERSITY; DOUGLAS DUNHAM, CLINTON A. SNYDER, M. CECIL MACKEY, CLARENCE L. WINDER, WILLIARD G. WARRINGTON, and DONALD R. COME,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Leland W. Carr, Jr.
Byron H. Higgins
Attorneys for Respondents
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AMERICAN PRINTING COMPANY
1200 WEST FORT STREET, DETROIT, MICHIGAN 48226 — (313) 963-9310

REASONS WHY THE WRIT SHOULD BE DENIED

I. NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE QUESTION OF WHAT STANDARD APPLIES IN GRANTING A JUDGMENT N.O.V. WHEN MADE BY THE PARTY WITH THE BURDEN OF PROOF.

II. THIS PETITION DOES NOT RAISE A SUBSTANTIVE ISSUE OF LAW BUT SIMPLY CHALLENGES THE APPELLATE COURT'S ASSESSMENT OF THE RECORD BELOW IN TERMS OF FINDINGS AND CONCLUSIONS OF FACTS.

III. THE JURY'S VERDICT IN FAVOR OF ALL DEFENDANTS ON THE QUESTION OF WHETHER THE UNIVERSITY DEVIATED FROM ITS NORMAL PROCEDURES PRECLUDES THE EVIDENTIARY INFERENCES DESIRED BY PETITIONERS.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
REASONS WHY THE WRIT SHOULD BE DENIED	1
I. NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE QUESTION OF WHAT STANDARD APPLIES IN GRANTING A JUDGMENT N.O.V. WHEN MADE BY THE PARTY WITH THE BURDEN OF PROOF	1
II. THIS PETITION DOES NOT RAISE A SUBSTANTIVE ISSUE OF LAW BUT SIMPLY CHALLENGES THE APPELLATE COURT'S ASSESSMENT OF THE RECORD BELOW IN TERMS OF FINDINGS AND CONCLUSIONS OF FACTS	2
III. THE JURY'S VERDICT IN FAVOR OF ALL DEFENDANTS ON THE QUESTION OF WHETHER THE UNIVERSITY DEVIATED FROM ITS NORMAL PROCEDURES PRECLUDES THE EVIDENTIARY INFERENCES DESIRED BY PETITIONERS	2
Conclusion	3

TABLE OF AUTHORITIES

Cases: **Page**

Adickes v *Kress & Co.*, 398 US 144, (1970) 2

Arlington Heights v *Metropolitan Housing Co*, 429 US 252 (1967) 2, 3

California v *Taylor*, 353 US 553 (1957) 1

Graver Tank & Mfg Co v *Linde Air Products Co* 336 US 271 (1948) 2

Pollard v *United States of America*, 352 US 354, 358 (1957) 2

Tyrrel v *Dist of Columbia*, 243 US 1 (1916) 1

United States of America v *Johnston*, 268 US 220, 227 (1925) 2

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The above respondents, by their attorneys, Leland W. Carr, Jr., and Byron H. Higgins, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Sixth Circuit's opinion in this case. That opinion is reported at 662 F2d 439.

Respondents adopt the findings and conclusions of facts as set forth in the opinion of the United States District Court for the Western District of Michigan filed on September 9, 1980, (16a-28a) and as amplified in the decision of the Sixth Circuit Court of Appeals.

REASONS WHY THE WRIT SHOULD BE DENIED

I. NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE QUESTION OF WHAT STANDARD APPLIES IN GRANTING A JUDGMENT N.O.V. WHEN MADE BY THE PARTY WITH THE BURDEN OF PROOF.

In this Writ, appellant raises for the first time an argument of law related to the criteria for awarding a judgment n.o.v. to a party having the burden of proof.

The applicable standard for a judgment n.o.v. was described in Appellant's Brief to the Sixth Circuit (p 14) and agreed to in Appellees' Brief (p 16). In neither brief was this argument raised. Nor did appellant raise this issue in his Petition for Rehearing and Petition for Rehearing En Banc (filed October 28, 1981).

This Court has established the policy that it will not consider questions unless raised in the record below and urged and briefed below. *Tyrrel* v *Dist of Columbia*, 243 US 1 (1916); *California* v *Taylor*, 353 US 553, 557, n 2 (1957).

This Court has also held that it "will not ordinarily consider" issues "neither raised before nor considered by the Court of Appeals," *Adickes* v *Kress & Co*, 398 US 144, 147, n 2 (1970). The only exception has involved indigent prisoners not represented by counsel. *Pollard* v *United States of America*, 352 US 354, 358 (1957).

II. THIS PETITION DOES NOT RAISE A SUBSTANTIVE ISSUE OF LAW BUT SIMPLY CHALLENGES THE APPELLATE COURT'S ASSESSMENT OF THE RECORD BELOW IN TERMS OF FINDINGS AND CONCLUSIONS OF FACTS.

As is evident from the petition, appellant desires this Court to review the record of the trial and correct the lower court's and the Appellate Court's factual conclusion. (Petition, pp 9-14).

This Court has stated that "We do not grant certiorari to review evidence and discuss specific facts." *United States of America* v *Johnston*, 268 US 220, 227 (1925). Where both the lower court and the appellate court reached the same factual conclusion, this Court has been less inclined to grant certiorari. The U. S. Supreme Court is "a court of law, . . ., rather than a court for correction of errors in fact finding, [and] cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Tank & Mfg Co* v *Linde Air Products Co*, 336 US 271, 175 (1948).

III. THE JURY'S VERDICT IN FAVOR OF ALL DEFENDANTS ON THE QUESTION OF WHETHER THE UNIVERSITY DEVIATED FROM ITS NORMAL PROCEDURES PRECLUDES THE EVIDENTIARY INFERENCES DESIRED BY PETITIONERS.

In Question II, appellant argues that departures from normal procedures is evidence of retaliation. (Petition, p 21). *Arlington Heights* v *Metropolitan Housing Co*, 429 US 252 (1967). The jury was instructed to return a verdict for

plaintiff on the due process count if the defendants violated the University procedures. The jury found for the defendants and against the plaintiff on this issue. (See Tr 1175; Appellee's Brief, p 23).

The fact that this issue was not expressly rejected in the decision of the Sixth Circuit has no significance whatsoever. Appellees know of no rule which requires an appellate court's opinion to account for every issue raised by an attorney. Nor can one extrapolate that by accepting the jury verdict for defendants on Count II that the Sixth Circuit has departed from this Court's decision in *Arlington Heights, supra*.

Petitioner seeks to have this Court review the findings made by the two lower courts and correct alleged factual errors. He does not present to this Court a substantive or significant question of federal law. Nor does the decision appealed from it place the Sixth Circuit in opposition to a decision of this Court or any other federal appellate court.

Petitioner is asking this court to review approximately thirteen hundred pages of transcript, approximately one hundred multi-paged exhibits, and reach a different set of factual conclusions than did the two lower courts.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Leland W. Carr, Jr.
Byron H. Higgins
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Dated: March 5, 1982

Petitioner's Reply Brief

No. 81-1517

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

JOHN R. HILDEBRAND,
Petitioner,

-VS-

BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, CLIFTON R. WHARTON, President, Michigan State University; JOHN EDWARD CANTLON, Provost, Michigan State University; EDWARD A. CARLIN, Dean of University College, Michigan State University; DOUGLAS DUNHAM, CLINTON A. SNYDER, CECIL M. MACKEY, CLARENCE L. WINDER, WILLARD G. WARRINGTON, and DONALD R. COME,
Respondents.

PETITIONER'S REPLY BRIEF

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TABLE OF CONTENTS

	Page
PETITIONER'S REPLY BRIEF	1
JURY VERDICT FORM II (DUE PROCESS)	3

PETITIONER'S REPLY BRIEF

In Respondents' Brief in Opposition, there are two significant misstatements regarding the status of the case. Respondents claim in part I that the issue of the burden of proof was not raised below. However, in Appellant's Brief to the Court of Appeals there appears the following statement:

> "Of course Defendants had the burden of proof on this issue once Plaintiff had shown that the protected activity was a motivating factor in the decision. Although Defendants had the burden of proof, they offered no significant evidence to contradict the testimony of Hildebrand's witnesses to the effect that Hildebrand's performance was far above average and among the best in the department. Defendant Dunham even acknowledged to a representative of the AAUP that he found Hildebrand's performance adequate." (Appellant's Brief, p 29)

Contrary to the statement that the issue was not raised in the Petition for Rehearing, that Petition included at page 3 the same quote from *Federal Insurance Company* v *Summers*, 403 F2d 971, 975-976 (1st Cir, 1968), as in the Petition for a Writ of Certiorari on pages 16 and 17, and the same quote from *Mihalchak* v *American Dredging Company*, 266 F2d 875, 877 (3rd Cir, 1959), on page 4 of the Petition for Rehearing as on page 20 of the Petition for a Writ of Certiorari. Respondents' statements in their Brief in Opposition are unexplicable to the attorney for the Petitioner.

The argument is made in part III of Respondents' Brief in Opposition that the jury verdict on the due process question precluded the evidentiary inferences on the First Amendment question. If true, this would support an argument that the verdict was inconsistent and for a new trial, but would not support the judgment notwithstanding the verdict in any event. The jury was asked to explain the

verdict for Plaintiff on the "First Amendment" issue. (115a-118a) However, the jury was instructed that its verdict was complete on the due process issue if it found for Defendants, without setting forth its reasons. Whether the jury found that Plaintiff lacked a "property" interest or that the procedural and substantive deviations did not rise to the level of a denial of due process is not known, since no party claimed the jury verdict was inconsistent. A copy of the "due process" jury form is attached.

Respectfully submitted,
Kenneth Laing, Jr.
MacLean, Seaman, Laing & Guilford
Counsel for Petitioner
Business Address:
1504 Michigan National Tower
Lansing, Michigan 48933
Telephone: (517) 372-0930

JURY VERDICT FORM II

COUNT II. (Due Process)

1. We, the jury, find in favor of the plaintiff and against one or more of the defendants.

Signed:
Foreperson

2. We, the jury, find for the defendants and against the plaintiff.

Signed: Paul J. Smith
Foreperson

Dated: January 5, 1980.

If you have found for the plaintiff (1.) and against one or more defendants, you will answer the following interrogatories, and then proceed to Jury Verdict Form III. If you have found for the defendants and against the plaintiff, your verdict is complete as to Count II. (If you have found for the plaintiff in Jury Verdict Form I, you will proceed to Verdict Form III.)

B. INTERROGATORIES FOR COUNT II.

1. Did the plaintiff have a property interest in continued employment at Michigan State University? Yes ___ No ___

2. Did the plaintiff have a property interest in having his reappointment considered in accordance with procedures established at Michigan State University? Yes ___ No ___

3. If you answered "yes" to interrogatory "1" or "2", then answer the following interrogatory. Was plaintiff deprived of a property interest without due process of law? Yes ___ No ___

4. If you answered yes to interrogatories "1" or "2", and yes to "3", then answer the following interrogatory. Were the defendants who denied plaintiff due process of law acting under color of state law? Yes ___ No ___

5. With respect to the following defendants do you find either that he knew or reasonably should have known that his actions would violate the constitutional rights of the plaintiff, or that he did not have a good faith belief that the actions he took were in accordance with the Constitution?

Dr. Clinton R. Wharton	Yes ___ No ___
Dr. John E. Cantlon	Yes ___ No ___
Dr. Edward A. Carlin	Yes ___ No ___
Dr. Douglas Dunham	Yes ___ No ___
Dr. Clinton A. Snyder	Yes ___ No ___

6. With respect to each of the following defendants, were that defendant's acts and conduct the proximate cause of injury and consequent damage to the plaintiff?

Dr. Clinton R. Wharton	Yes ___ No ___
Dr. John E. Cantlon	Yes ___ No ___
Dr. Edward A. Carlin	Yes ___ No ___
Dr. Douglas Dunham	Yes ___ No ___
Dr. Clinton A. Snyder	Yes ___ No ___

7. Have you found that two or more of the following defendants entered into a conspiracy to deprive the plaintiff of property without due process of law? If so, indicate the members of that conspiracy by placing an (x) next to such defendant's name.

Dr. Clinton R. Wharton	( )
Dr. John E. Cantlon	( )
Dr. Edward A. Carlin	( )
Dr. Douglas Dunham	( )
Dr. Clinton A. Snyder	( )

8. Has plaintiff shown by a preponderance of the evidence that

(i) he is entitled to a due process hearing? Yes ___ No ___

(ii) he is entitled to be reinstated at Michigan State University? Yes ___ No ___

Amicus Brief

1

MAR 10 1982

No. 81-1517

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

JOHN R. HILDEBRAND,
Petitioner,

-VS-

BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, CLIFTON R. WHARTON, President, Michigan State University; JOHN EDWARD CANTLON, Provost, Michigan State University; EDWARD A. CARLIN, Dean of University College, Michigan State University; DOUGLAS DUNHAM, CLINTON A. SNYDER, CECIL M. MACKEY, CLARENCE L. WINDER, WILLARD G. WARRINGTON, and DONALD R. COME,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Tom Downs
DOWNS, ZARGAROLI AND DOWNS, P.C.
Counsel for Lansing Michigan Branch, American Civil Liberties Union of Michigan and Michigan State University Chapter, American Association of University Professors
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Date: March 2, 1982

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1200 WEST FORT STREET, DETROIT, MICHIGAN 48226 -- (313) 963-9310

No. 81-1517

**IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1981**

JOHN R. HILDEBRAND,
Petitioner,

-VS-

BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, CLIFTON R. WHARTON, President, Michigan State University; JOHN EDWARD CANTLON, Provost, Michigan State University; EDWARD A. CARLIN, Dean of University College, Michigan State University; DOUGLAS DUNHAM, CLINTON A. SNYDER, CECIL M. MACKEY, CLARENCE L. WINDER, WILLARD G. WARRINGTON, and DONALD R. COME,
Respondents.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to Rule 36 of the Rules of the Supreme Court of the United States, the undersigned respectfully requests Leave to File a Brief Amicus Curiae in support of Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Leave to File a Brief Amicus Curiae is requested in light of the likely impact of the earlier decision of the Sixth Circuit Court of Appeals on questions of academic freedom and First Amendment rights of expression of university faculty if allowed to stand. From the point of view of the undersigned, the issues involved in this case tend, then, to transcend the particular interests of the Petitioner.

The American Civil Liberties Union is an organization which has long been dedicated to preserving and protecting the rights, privileges and immunities guaranteed by the United States Constitution, and the American Association of University Professors, which is a national, voluntary, non-profit organization comprised of university professors and related persons, is an organization which throughout its history has evidenced a special concern for the protection of the principle of academic freedom.

The interests of both organizations in this matter have been demonstrated in previous filings with the United States District Court and the United States Court of Appeals for the Sixth Circuit, and it is the jointly held belief of the two organizations that a brief amicus curiae would be desirable and of aid to the Court in rendering a decision on the Petition now before it.

For the record, verbal consent of the parties to the above entitled action to the filing of a Brief Amicus Curiae by the Lansing Branch, American Civil Liberties Union of Michigan and the Michigan State University Chapter of the American Association of University Professors was secured on the date of February 22, 1982. On that date, too, Counsel for the Petitioner formally signed said consent; unfortunately, however, Counsel for the Respondents has failed as yet to do so. Hence this Motion for Leave to File.

Respectfully submitted,

Tom Downs,
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March 2, 1982

BRIEF OF AMICUS CURIAE LANSING MICHIGAN BRANCH, AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN

MICHIGAN STATE UNIVERSITY CHAPTER, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

This brief amicus curiae is filed on behalf of the Lansing Michigan Branch of the American Civil Liberties Union of Michigan and the Michigan State University Chapter of the American Association of University Professors, as authorized by their respective Boards of Directors and Officers pursuant to authority vested in each by their respective constitutions.

STATEMENTS OF INTEREST

The American Civil Liberties Union is dedicated to preserving and protecting the rights, privileges and immunities guaranteed by the United States Constitution. In the case in point, the ACLU is particularly concerned that plaintiff-appellant, JOHN R. HILDEBRAND, may have been denied his rights and the due process of law guaranteed by the 1st and 14th amendments. The rights of public employees to speak out on issues involving their employment are at issue here as are the rights of public employees to have their status as employees reviewed consistent with the processes and procedures formally adopted for the purpose by their employing organizations. Because we consider that the rights of plaintiff-appellant, JOHN R. HILDEBRAND, have not been accorded adequate protection, and because we consider this issue to be of such vital importance, the ACLU and its members respectfully join with the Michigan State University Chapter of the AAUP in submission of this brief amicus curiae.

The American Association of University Professors is a national, voluntary, non-profit organization comprised of

university professors and related persons, and the Michigan State University Chapter of the AAUP is a chartered chapter of that organization with a membership of about 300 faculty members at Michigan State.

The AAUP throughout its history has been concerned with the protection of the climate of academic freedom in academe and has, in many instances, entered as party or as amicus in cases in which faculty members have claimed wrongful dismissal.

The MSU Chapter of the AAUP has had previous involvement in Professor Hildebrand's case, to wit: (1) MSU-AAUP was asked by Professor Hildebrand to conduct an investigation of his termination and did so, reporting its findings in a letter from then-President of the Chapter, Al Rabin, to Professor Dunham, dated February 29, 1969. That letter was admitted in evidence as Plaintiff's Exhibit No. 28, and is contained in Petitioner's Appendix at page 122a, and following. (2) On December 15, 1972, MSU-AAUP supported the amicus brief of the American Civil Liberties Union in this same matter.

MSU-AAUP is concerned not only with Professor Hildebrand's case, but with the general climate of academic freedom at Michigan State University. We believe that academic freedom is substantially damaged when any academic decision is made in a way that is tainted by considerations arising from a faculty members free exercise of his or her First Amendment Rights.

STATEMENT OF RIGHTS

The U.S. Court of Appeals for the Sixth Circuit, through an opinion decided and filed October 19, 1981, has supported the District Court in finding that Professor Hildebrand "would have been denied tenure regardless of his First Amendment protected activities." (Page 9).

We disagree.

ARGUMENT

MSU-AAUP and ACLU jointly maintain in the first instance that Professor Hildebrand was not afforded normal due process in the rendering of decision on his appointment to tenure at Michigan State University.

This question formed the substance of the investigation carried out by AAUP in 1969. As evidenced in Plaintiff's Exhibit No. 28, attached, Professor Dunham failed to meet the following requirements of due process:

1. A decision be made on the basis of a serious attempt to obtain relevant evidence;

2. That the person being evaluated be given a full opportunity to present evidence in his own behalf and to rebut evidence presented against him, directly to all those who are judging him;

3. That those who evaluate this evidence are competent and authorized to do so;

4. That the decision be made after and only after all the evidence has been presented. At the departmental level this requires that only those who have analyzed and evaluated the evidence be permitted to render a decision.

The AAUP investigation report expresses as "most important" the fact that Professor Hildebrand "was not given an opportunity to present evidence on his own behalf, nor to rebut evidence against him before a decision was reached . . . ."

MSU-AAUP and ACLU jointly maintain that the procedures used in arriving at the decision not to appoint Professor Hildebrand for tenure were irregular and improper.

There is ample evidence in the record that the procedure employed by Professor Dunham differed substantially from past and common practice within the

department, that it did not conform to department bylaws, and that it took place at an unusual time, i.e., during the summer.

On the basis of these considerations, MSU-AAUP and ACLU jointly conclude that the actual process of decision in Professor Hildebrand's case was extraordinary and in consequence thereof has tended to undermine the foundations of peer review and academic governance at Michigan State University.

If the process of decision was extraordinary, as evidenced on the record, it must have been so for some reason. Here the record seems clearly to indicate that the only differences between the consideration of Professor Hildebrand and that normally employed within the department centered on Professor Hildebrand's differences with the administration of the department, namely his election to the departmental advisory committee and his criticism of instructional policy. A reasonable conclusion is that had not Professor Hildebrand's protected activities been at issue, normal procedures would have been followed and he might well have been granted tenure. If that is so, and we believe it to be so, the burden of showing that Professor Hildebrand would have been denied tenure in any event rests with the Respondents in this case, which burden, we respectfully submit, Respondents have failed to meet. Thus there has been created, on the record, a clear presumption that Professor Hildebrand likely would have been granted tenure had it not been for his exercise of protected activities under the First Amendment.

The decision of the United States Court of Appeals for the Sixth Circuit in this matter also states: "The tenure process at Michigan State involves many steps. There was no reason for the Dean of the University College, the Provost, or the Board of Trustees to deny tenure or recommend the denial of tenure because of Dr. Hildebrand's activities." (Page 9).

This is, of course, quite literally true. It must be noted, however, that there is an established common practice within the University, under terms of which recommendations by departments to *withhold* tenure are *seldom* considered by higher levels. In effect, recommendations to deny tenure are not normally subject to the "many step" review process cited, and the existence of that review process for tenure decisions does not constitute evidence that Professor Hildebrand would have been denied tenure absent activities protected by the First Amendment.

CONCLUSION

The Michigan State University Chapter of the American Association of University Professors, acting jointly with the Lansing, Michigan Branch of the American Civil Liberties Union of Michigan, respectfully conclude, therefore, that the petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit in this case should be granted.

Respectfully submitted,

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March 2, 1982

Amicus Brief

2

Office - Supreme Court, U.S.
FILED
MAR 12 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1517

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JOHN R. HILDEBRAND,
Petitioner,

-VS-

BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, CLIFTON R. WHARTON, PRESIDENT, MICHIGAN STATE UNIVERSITY; JOHN EDWARD CANTLON, PROVOST, MICHIGAN STATE UNIVERSITY; EDWARD A. CARLIN, DEAN OF UNIVERSITY COLLEGE, MICHIGAN STATE UNIVERSITY; DOUGLAS DUNHAM, CLINTON A. SNYDER, CECIL M. MACKEY, CLARENCE L. WINDER, WILLARD G. WARRINGTON, AND DONALD R. COME,
Respondents.

BRIEF OF AMICUS CURIAE MICHIGAN EDUCATION ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. IS AN INDIVIDUAL'S RIGHT TO A TRIAL BY JURY AND TO HAVE FINDINGS OF FACT MADE BY THAT JURY UNDER THE SEVENTH AMENDMENT DENIED WHERE A FEDERAL COURT HOLDS ANOTHER VIEW OF THE EVIDENCE PRESENTED TO THE JURY TO BE MORE REASONABLE AND THEREAFTER REVERSES THE JURY'S VERDICT?

II. DOES A PUBLIC UNIVERSITY VIOLATE AN EMPLOYEE'S FIRST AMENDMENT RIGHTS BY DISCHARGING HIM FOR CRITICIZING THE UNIVERSITY'S CURRICULUM AND BEING ELECTED TO AN ACADEMIC ADVISORY COMMITTEE, WHERE THE EMPLOYEE'S IMMEDIATE SUPERVISOR RECOMMENDED THE EMPLOYEE'S DISCHARGE BASED UPON THAT CONDUCT, BUT WHERE THE UNIVERSITY'S GOVERNING BODY RELIED ONLY UPON THE SUPERVISOR'S RECOMMENDATION?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
I. THE DECISIONS OF THE LOWER COURTS ARE CONTRARY TO THE PRIOR HOLDINGS OF THIS COURT AND SERVE TO DENY DR. HILDEBRAND HIS RIGHT UNDER THE SEVENTH AMENDMENT TO A TRIAL BY JURY.	4
II. WHERE AN ADMINISTRATOR CHARGED WITH RECOMMENDING THE CONTINUED EMPLOYMENT OF A UNIVERSITY EMPLOYEE RECOMMENDS THE DISCHARGE OF THAT EMPLOYEE DUE TO HIS EXERCISE OF FIRST AMENDMENT RIGHTS, THE ADMINISTRATOR'S ACTIONS AND MOTIVES MUST BE IMPUTED TO THE UNIVERSITY AS A WHOLE WHERE THE UNIVERSITY RELIES ON THE ADMINISTRATOR'S RECOMMENDATIONS IN EVENTUALLY DISCHARGING THE EMPLOYEE.	8
CONCLUSION	13

TABLE OF AUTHORITIES

Cases:	Page
Atlantic & Gulf Stevedores v. *Ellerman Lines, Ltd.*, 369 US 355 (1962)	7
Curtis v. *Loether*, 415 US 189 (1974)	4
Gallick v. *Baltimore & Ohio Railway Co.*, 372 US 108 (1963)	5
Givhan v. *Western Line Consolidated School District*, 439 US 410 (1979)	2, 8
Hildebrand v. *Board of Trustees of Michigan State University*, 607 F2d 705 (6th Cir, 1979)	4
Mount Healthy City Board of Education v. *Doyle*, 429 US 274 (1977)	*passim*
Pickering v. *Board of Education*, 391 US 563 (1968)	8

BRIEF OF AMICUS CURIAE MICHIGAN EDUCATION ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

INTEREST OF AMICUS CURIAE

The Michigan Education Association is the largest organization of professional teachers in the State of Michigan. Within the State, the Michigan Education Association (hereinafter called the "Association") has approximately 578 local affiliates which engage in collective bargaining with various school districts throughout the State, represent their members in the presentation of employment-related grievances, and participate in and comment on the operation and effectiveness of public educational insitutions, including public universities in the State. In seeking to represent its members in the exercise of their constitutional and statutory rights, the Association participates regularly in matters which may have a pervasive effect on those rights.

The issues raised in this case clearly affect some of those constitutional rights which the Association's members regularly seek to exercise: the First Amendment right to comment on matters of public concern involving the operation and effectiveness of the State's institutions of higher education and those involving an employee's right to participate in the administration of that institution. The Association believes that the outcome of this case to date has had, and will continue to have, a chilling effect on its members in their efforts to comment on the effectiveness of educational institutions in this State, unless this Court corrects the errors of the courts below. Furthermore, those of the Association's members who find themselves confronted by educational institutions when they seek to exercise these rights may find their right to a trial by jury to vindicate their rights substantially impaired by the decisions of the courts below.

SUMMARY OF ARGUMENT

The District Court began its effort to reverse the findings of a jury ruling in Petitioner's favor by restating the apparent concern of some federal judges as to whether "they should really continue to try to run state colleges and universities from a long distance." (Petitioner's Appendix at page 15a). Beginning with this preconceived notion, the District Court proceeded to "gut" the findings of the jury through an analysis which disavowed any conclusion or inference favoring the Petitioner, thereby finding no evidence to support the jury's verdict. These evidentiary conclusions were adopted by the Court of Appeals in affirming the District Court. While agreeing wholeheartedly with the Petitioner's arguments objecting to the lower courts' view of its role in reviewing the jury's decision, the Association's concern is much broader and is directed to two issues: the substantial dimunition of the Seventh Amendment's right to trial by jury suffered by Petitioner, and others similarly situated, due to the lower courts' response to the jury's verdict and, the insuperable burden the lower courts' decisions place upon public employees, such as Dr. Hildebrand, attempting to prove a violation of their constitutional rights and a discriminatory discharge due to the exercise of those constitutional rights.

The Association's First Amendment concern is primarily based on the lower courts' interpretation of this Court's decisions in *Mount Healthy City Board of Education* v *Doyle*, 429 US 274 (1977) and *Givhan* v *Western Line Consolidated School District*, 439 US 410 (1979). Those cases established that a public employee seeking to challenge his/her discharge on the ground that it was based on the exercise of constitutionally protected rights must first establish that the exercise of those rights played a substantial role in his/her discharge. Once that is established, the public employer has the burden of proving that the discharge would have taken place regardless of the protected conduct. The Association's concern is based on the stultify-

ing interpretation given to this Court's otherwise rational formula for dealing with the exercise of constitutional rights in public employment by the lower courts. In reversing the jury's verdict here, the lower courts found that Dr. Hildebrand would have been discharged any way, since some of the "upper level" administrators who passed upon Petitioner's tenure decision were not motivated by any malicious intent or reckless disregard of the truth. What the lower courts would apparently require of an employee such as Dr. Hildebrand is proof that *every* individual in the hierarchy of a public institution who passes upon the employment future of a particular individual hold the same animosity toward that employee based upon protected conduct as the employee's immediate supervisor. Apparently the lower courts believed that Dr. Hildebrand would have been discharged regardless of his protected First Amendment activity since the University's President, Provost, and Board of Trustees did not act with malice or an improper motive. This holding destroys those rights guaranteed by this Court's decisions in *Mount Healthy* and *Givhan* by permitting front line supervisors to violate with impunity the constitutional rights of a public employee so long as the "upper level" management of that institution has no knowledge of the constitutional violations or does not base its decision entirely on those violations regardless of the basis for the initial recommendations.

The Association's other major concern turns on what we perceive is the lower courts' rejection of the role of the jury in civil rights cases such as this. The lower courts' efforts to thwart the will and findings of the jury in this case poses a clear violation of the requirements of the Seventh Amendment thus justifying this Court's intervention.

I. THE DECISIONS OF THE LOWER COURTS ARE CONTRARY TO THE PRIOR HOLDINGS OF THIS COURT AND SERVE TO DENY DR. HILDEBRAND HIS RIGHT UNDER THE SEVENTH AMENDMENT TO A TRIAL BY JURY.

The lower courts' opinions indicate one thing, if they indicate nothing else: those courts strongly disagreed with the jury's findings of fact in this case and they expressed that disagreement by reevaluating the evidence presented by the parties. In doing so, however, they treaded heavily on Dr. Hildebrand's right to a trial by jury as guaranteed him by the Seventh Amendment.

It cannot be reasonably disputed here that once Dr. Hildebrand made a timely demand for trial by jury, the Seventh Amendment protected his right to that form of trial in the type of case he intended to present to the District Court. *Hildebrand* v *Board of Trustees of Michigan State University*, 607 F2d 705 (6th Cir 1979). See also *Curtis* v *Loether*, 415 US 189 (1974). Once that right to a trial by jury has been established, however, the Seventh Amendment also protects the integrity of the jury's findings from being overturned by courts which may disagree with the jury's view of the evidence.

This Court has considered on numerous occasions the role of the judiciary in reviewing findings of fact made by a jury, especially where those findings were indicated by answers to special interrogatories. Where, as here, the jury must draw inferences and conclusions from the evidence, and then answer specific interrogatories, the Court has spoken forcefully as to an appellate court's role:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn

> by the jury. It is the jury, not the court which is the fact finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. [citations omitted] That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." [*Tennant* v *Peoria & P.U.R. Company*] 321 US, at 35." *Gallick* v *Baltimore and Ohio Railway Company*, 372 US 108, 114-115 (1963).

Furthermore, this Court has decreed that if inconsistencies are alleged in a jury's answers to special interrogatories, a court's first duty is to harmonize those inconsistencies to avoid any possible confrontation with the Seventh Amendment.

> "But it is the duty of the court to attempt to harmonize the answers, if it is possible under a fair reading of them: 'where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way.' *Atlantic and Gulf Stevedores, Inc.* v *Ellerman Lines, Ltd.*, 369 US 355, 364, 7 LEd 2d 798, 807, 82 S Ct 1134. We therefore must attempt to reconcile the jury's findings, by exegesis if necessary, as in *Arnold* v *Panhandle & S.F.R. Co.*, 353 US 360, 1 LEd 2d, 889, 77 SCt 840; [Citations omitted], before we are free to disregard the jury's special verdict and remand the case for a new trial." *Gallick, supra* at page 119.

In reversing the jury's verdict and findings of fact, the lower courts failed to adhere to these fundamental require-

ments in the protection of Seventh Amendment rights. In so doing, they denied to Dr. Hildebrand his right to a trial by jury and to the findings of fact made by that jury.

The District Court's opinion overturning the jury's verdict is repleat with examples of that court's infringement of the jury's responsibilities. For example, a review of that portion of the District Court's opinion set out at page 20a of the Petitioner's Appendix contains the court's analysis of evidence regarding Dr. Hildebrand's criticism of curriculum and other conditions within his department. The court concludes that "any basis for inferring a causal connection between [Dr. Hildebrand's criticisms and his discharge] is lacking." (App. 20a). While the District Court reached this conclusion, the jury obviously did not and the record contains ample support for *the jury's inferences*. (See e.g., Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, filed herein, pages 24-25; Jury Verdict Form, Question 2 for Count I (App 116a)). There are numerous other examples contained in the District Court's opinion where the court felt "compelled to accept this logical and sensible approach [by the University]" (App 21a) and considered Dr. Hildebrand's and the jury's interpretation of the University's actions and the proofs to be illogical or based upon speculation and conjecture. While the Association here could cite numerous other examples of the shortcomings of the District Court's analysis (and, perhaps, its underlying motivations)[1], an impartial analysis of the District Court's own opinion will establish more than sufficient proofs and inferences to support the jury's verdict.

[1] We are concerned that much of the District Court's opinion indicates a motivation and desire to rebuff the Court of Appeals for the Sixth Circuit for its remand of this case to the District Court's crowded docket. The record in this case is filled with strong indications of a long standing dispute between the District Court and the Court of Appeals over the method of operation adopted by each. (See App 6a, Note 8; App 11a-15a, especially Notes 1, 3, and 4; App 32a). The Association, not being a party below, notes this concern now only to point out as an example, one of the sound policy reasons supporting this Court's interpretation of the requirements of the Seventh Amendment as stated in the cases cited.

The Court of Appeals' opinion in this case is even more telling, however. The Court of Appeals' Statement of Facts acknowledges that Dr. Hildebrand criticized the University's curriculum requirements, believing them to substantially restrict his teaching. (App 3a). The Court of Appeals also noted that Dr. Hildebrand's election to the Departmental Advisory Committee caused tenured faculty members "consternation" due to the shift in departmental power and that the department chairman and the assistant chairman were "disturbed" or considered this shift of departmental power and the elections to be a "rotten or stinking fish" within the department. (App 4a) Despite these and other facts found by the Court of Appeals, the Court also struck down the jury's findings of fact and verdict believing the inferences the court drew to be more strongly supported than those drawn by the jury. In making this judgment, however, the Court of Appeals fell into the trap recognized by this Court in *Atlantic & Gulf Stevedores* v *Ellerman Lines, Ltd.*, 369 US 355 (1962), where this Court said:

> "We might agree with the Court of Appeals had the questions of fact been left to us. But neither we nor the Court of Appeals can redetermine facts found by the jury anymore than the District Court can predetermine them. For the Seventh Amendment says that 'no facts tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.' " 369 US at 358-359.

And this Court concluded:

> "Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search for one possible view of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment. [citations omitted]" 369 US at 364.

Here, the Court of Appeals and the District Court failed to even attempt to resolve the proofs and the verdict. In so doing, they directly and impermissibly frustrated Dr. Hildebrand's Seventh Amendment rights and his requested trial by jury.

II. WHERE AN ADMINISTRATOR CHARGED WITH RECOMMENDING THE CONTINUED EMPLOYMENT OF A UNIVERSITY EMPLOYEE RECOMMENDS THE DISCHARGE OF THAT EMPLOYEE DUE TO HIS EXERCISE OF FIRST AMENDMENT RIGHTS, THE ADMINISTRATOR'S ACTIONS AND MOTIVES MUST BE IMPUTED TO THE UNIVERSITY AS A WHOLE WHERE THE UNIVERSITY RELIES ON THE ADMINISTRATOR'S RECOMMENDATIONS IN EVENTUALLY DISCHARGING THE EMPLOYEE.

In *Mount Healthy City Board of Education* v *Doyle*, 429 US 274 (1977), this Court established the manner in which a public employee's right to free speech under the First Amendment would be balanced against the public employer's interest "in promoting the efficiency of the public services it performs through its employees". Id. at p. 284, quoting *Pickering* v *Board of Education*, 391 US 563, 568 (1968). The Court balanced these interests in holding:

> "that once the employee has shown that his constitutionally protected conduct played a 'substantial' role in the employer's decision not to rehire him, the employer is entitled to show 'by a preponderance of the evidence that it would have reached the same decision as to [the employee's] reemployment even in the absence of the protected conduct.' [*Mt. Healthy*] at 287, 50 LEd 2d 471, 97 SCt 568." *Givhan* v *Western Line Consolidated School District*, 439 US 410, 416 (1979).

The question presented for the Court is what must the public employer prove to meet its burden by "a preponderance of the evidence"? The lower courts found that the employer here met its burden if it showed that its upper level administrators held no malicious motive toward Dr. Hildebrand, but acted in good faith on recommendations received from lower level administrators. As can be seen from the discussion below such a holding destroys any constitutional rights or protections which existed after this

Court's decision in *Mt. Healthy* by exonerating a public employer from liability for the acts of its administrators if the public employer has a sufficiently multi-layered administrative review procedure.

The jury's verdict in this case indicated agreement with Dr. Hildebrand's allegation that his department chariman, Dr. Dunham, and assistant department chairman, Dr. Snyder, were substantially motivated to recommend Petitioner's discharge because of his criticism of department curriculum and his election to the Departmental Advisory Committee (App 117a). While the lower courts disagreed with the jury's conclusion, both acknowledged that there were proofs on the record from which the jury apparently drew its conclusion. (App 10a, 23a-26a). The Court of Appeals found, however:

> "The tenure process at Michigan State involves many steps. There was no reason for the Dean of the University College, the Provost, or the Board of Trustees to deny tenure or recommend the denial of tenture because of Dr. Hildebrand's activities. The jury apparently agreed, because it ruled in favor of all defendants except Dr. Dunham, the department chairman, and Dr. Snyder, his assistant. Dr. Dunham based his decision on a recommendation received from the department tentured faculty members." (App 9a)

What the Court of Appeals apparently believes, and has now established as the law of the Sixth Judicial Circuit, is that a public employee fails in his burden to show a discriminatory discharge unless he shows that each administrator at each administrative level within a public body held the same discriminatory motive as the administrator originally recommending discharge. In this case, Dr. Hildebrand was apparently required to show that Michigan State University's President, and at least 51% of its Board of Trustees, intended to discharge him based upon their knowledge of his curriculum criticisms and his elected position to the

Departmental Advisory Committee. Noting that only the department chairperson *directly* reviews and decides employment questions for the faculty in each department, and that all other administrators in the University rely upon those recommendations, the Court of Appeals decision to require a party to establish proof of a constitutionally impermissible motive on the part of upper level administrators or lower level faculty for all practical purposes results in the deprivation of those rights sought to be protected by this Court in its prior decisions. For example, assume a situation where Dr. Hildebrand's department chairman announces that due to Dr. Hildebrand's curriculum criticisms, the department chairman has recommended the discharge of Dr. Hildebrand, and the proofs indicate that the department chairman's recommendations have been followed *in every case*. Dr. Hildebrand is then discharged despite receiving excellent evaluations of his performance. Clearly, under this Court's holding in *Mt. Healthy* and *Givhan*, Dr. Hildebrand could show a discriminatory discharge. The proofs and the jury's findings here are clearly sufficient to support the conclusion that such a scenario existed in Dr. Hildebrand's case, yet both of the lower courts have added another step to the employee's burden of proof. Both lower courts found Dr. Hildebrand's discharge proper because he could not establish that his department chairman's improper motives were shared by the University's administrative hierarchy, nor could he show the same "smoking gun" as to other members of the tenured faculty with whom the department chairman consulted. (See App 10a) In so doing, however, these courts have turned the burden of proof required by this Court in cases such as this on its head.

In *Mt. Healthy*, this Court established the proposition that a public employer is required to prove "by a preponderance of the evidence" that it would have reached the same decision to discharge a public employee even absent the employee's protected conduct. 429 US at 287. Logically, these proofs would require, in this instance, a substan-

tial showing that Dr. Hildebrand was unfit as a teacher or academically inferior to individuals who had received tenure in other cases. The lower courts' opinions are virturally void of any discussion in this regard and clearly fall short of that standard required to overturn a jury verdict (See Argument I above). It is clear that what the lower courts relied upon was Dr. Hildebrand's inability to prove an impermissible motive on the part of all tenured faculty or his department chairman's superiors. In so relying, the lower courts thereby shifted the burden of proof from the University to show the inevitability of its actions, to Dr. Hildebrand to show an impermissible motive on the part of an entire university hierarchy. Rather than show his First Amendment conduct to be a "substantial" factor in his discharge, the lower courts would have Dr. Hildebrand be required to show that his conduct was the *only* factor evident in his discharge and that *all* other administrative personnel relied upon this impermissible motive.

We do not believe that this Court intended to place such a heavy burden upon public employees who seek to speak freely concerning matters of import in the conduct of public institutions. The effect of the lower court's decisions in applying their interpretation of this Court's decision in *Mount Healthy* results in the adoption of a standard where public universities can quash the First Amendment rights of their faculty by adopting administrative review procedures for discharge with sufficient steps so that those administrators making the final decision on re-employment are not tarred with the sins of their subordinates, being sufficiently removed as to bear no personal ill will due to the protected conduct of the public employee. It is apparently irrelevant that the administrative hierarchy universally follows the recommendations of its subordinate administrators. These subordinates' transgressions of an employee's First Amendment rights are insulated from the employement decision process of a university to a sufficient extent that no liability can ever be found.

The question posed herein by the Court of Appeals' misapplication of this Court's decision in *Mount Healthy* is of substantial importance to the jurisprudence of this nation and the protection of public employees' First Amendment rights. In the absence of this Court's intervention, a decision contrary to prior decisions of this Court and the interests of justice will be allowed to stand. For public employees, the First Amendment will offer little protection when seeking to comment on the operation of public institutions in hopes of improving the services they are employed to provide.

CONCLUSION

The Michigan Education Association strongly believes that a grave injustice has been committed in this case and that at least two questions of substantial importance to the jurisprudence of this nation are presented herein. Furthermore, the lower courts disposition of this case is in conflict with prior decisions of this Court and works a substantial injustice on the Petitioner and others similarly situated who seek to exercise both their First Amendment and Seventh Amendment rights in the context of their employment in an academic setting and in their efforts to retain that employment. Therefore, for the reasons stated herein and for the reasons stated in the Petition for Writ of Certiorari previously filed by John R. Hildebrand, a writ of certiorari should issue to review the decision of the Court of Appeals for the Sixth Circuit in this case.

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